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In the Supreme Court of the United States

OCTOBER TERM 1946

No. 207

EMORY S. LAND, etc., et al.,
Petitioners,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, et al.,
Respondents.

BRIEF FOR RESPONDENTS
On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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Subject Index

	Page
Statement of the Case	1
1. Jurisdiction	1
2. The Proceedings	2
3. The Issues Presented	2
4. The Facts	4
(a) The Circumstances in Which the Contract of August 15, 1938 Was Made	6
(b) The Contract of August 15, 1938	8
(c) Payment of the Indebtedness	10
(d) The Complaint Alleges that the Stock Was Transferred in 1938 as Collateral Only	10
(e) The Complaint Also Alleges Lack of Authority in the Commission to Take the Stock Except as Collateral	11
(f) Institution of the Suit	11
(g) Assertion of Title in the United States:—It Is Petitioners Who Make that Assertion, Not the United States	12
5. The Cause Was Decided by the District Court on the Complaint Alone and in No Part on the Affidavits	12
The Petitioners Did Not Contend in the Court of Appeals that the Affidavits Had Any Bearing on the Jurisdictional Question or that the District Court, in Dismissing for Lack of Jurisdiction, Relied Thereon. That Argument Is First Made in This Court	16
The Questions Presented	17
Summary of the Argument	18
I. With Respect to the Question Whether the Complaint States a Claim for Relief and Its Nature	18
II. With respect to the So-Called Jurisdictional Claim	18
III. With Respect to the Propriety of a Summary Disposition of the Case on the Basis of Petitioners' Ex Parte Affidavits	19

Page

Argument 20

Point One: The Complaint States a Claim for Relief Against the Individual Petitioners 20

I. Preliminary:—The Test of Sufficiency of a Complaint 20

II. The Grounds Upon Which the Complaint States a Claim for Relief: There Are Two; Each Is Independently Sufficient, but Each Supports the Other 22

The Two Grounds, Though Independent, Interact:—If There Is at Least Grave Doubt of the Legality of the Transaction if Construed as a Sale, and if It May Be Construed as a Transfer by Way of Security, It Should Be So Construed 24

III. First Ground on Which the Complaint States a Claim for Relief:—The Law Conferred No Authority on the Maritime Commission to Purchase Stock of a Private Corporation; the Power of the Commission Was Limited to the Acquisition of Stock as Collateral to Secure a Debt. In Fact, the Commission Was Prohibited from Acquiring the Shares Except as Collateral 25

A. Lack of Authority to Purchase the Shares 25

1. No Government Agency Can Act Beyond or Outside of Authority Granted by Statute, and if It Purports to Do So, Its Action Is Void 25

2. Congress Conferred No Authority on the Maritime Commission to Acquire Stock in a Private Corporation Except as Collateral:—Section 207 of the Merchant Marine Act Here Considered 27

(a) The Terms of Section 207 Negative the Existence of the Power 27

(b) The Legislative History of the Act Negatives the Power 28

(c) Nothing in the Spirit or Preamble of the Act Confers the Power 31

3. The Power Cannot Be Found in Any Other Statute or Source 34

B. Prohibition of Purchase of the Stock 36

Page

C. An Opinion of the Attorney General Shows Lack of Power in the Commission to Take Outright Title 38

Doubts Expressed by Other Governmental Agencies 40

D. Conclusion:—As a Consequence of Lack of Power of the Commission to Acquire Title Outright to Shares in Private Corporations, the Contract of August 15, 1938 Cannot Be Given Effect as a Contract of Sale and Purchase 41

IV. Second Ground on Which the Complaint States a Claim for Relief:—As a Matter of Construction, the Contract of August 15, 1938 Was a Security Transaction Substituting a Pledge of Stock, Which Gave the Creditor Control of Management, for the Personal Obligation of Certain Sureties 41

A. Any Conveyance, However Absolute It Seems to Be on Its Face, May Be Deemed a Mortgage or a Transfer as Security 44

B. The Contract of August 15, 1938 in Fact Does Not Purport to Be a Sale, but on Its Face It Is More Consistent with Being a Security Transaction Than a Sale 45

1. Provisions with Respect to Right of Transferee to Sell 45

2. The Commission's Dominant Purpose Is Revealed as Being to Control the Management to Protect the Debt, that Being the Only Proper Purpose 47

3. Express Provision that the Transfer of the Stock Would Not Reduce the Indebtedness of Dollar of Delaware to Any Extent Whatever 49

4. Lack of Any Adequate Consideration to the Other Stockholders for an Outright Transfer of Their Stock 55

C. Facts and Circumstances Outside the Face of the Contract but Revealed by the Complaint Demonstrate that the Contract Worked No More than a Pledge as Substitution of Collateral and Support the Allegations of the Complaint to that Effect, Under Settled Principles of Equity and Law 57

1. Summary Statement of Controlling Principles and of the Facts 57

Page

2. Discussion of the Authorities Supporting the Foregoing Principles 59

Point Two: The District Court Had Jurisdiction 71

I. The Suit Is Not One Against the United States but Is a Possessory Action Against Certain Individuals, Based on Their Own Wrongdoing, from Which They Are Not Relieved Because They Profess to Act as Agents for Another 71

A. For Jurisdictional Purposes the Allegations of the Complaint Are Taken as True 73

B. Judgment in This Case Will Not Be Res Judicata with Respect to the United States 74

C. Respondents' Rights Are Possessory, and Not Based on Contract with the United States or Title Claimed to Be Derived from the United States 75

D. Petitioners Are Personally Accountable and Suable, and the Fact that They Claim to Act as Agents of Another Is No Defense 78

II. The Assertion by Government Agents of Title in the United States, When Personally Sued, Does Not Defeat the Jurisdiction. The Case of *United States v. Lee* Is Conclusive on the Subject, and Respondents Are Entitled to Recover Possession 80

Answer to Petitioners' Attempt to Distinguish the Case of United States v. Lee 86

Right to Relief Against All Classes of Petitioners 96

III. Petitioners Rely on Authorities Pertaining to Three Types of Situations, None of Which Is Here Involved 98

A. This Is Not the Equivalent of an Action to Compel Specific Performance of a Contract by the United States 98

B. This Suit Is Not One to Compel the United States to Part with an Admitted Title or to Control Disposition of Property Admittedly Owned by the United States 103

C. Suits to Recover Money from the Public Treasury Are of No Analogy 105

Page

IV. The Doctrine of Sovereign Immunity Has Long Been in Disfavor and Decaying and by Virtue of Statutes Enacted by Congress in 1946 Is Now Nonexistent. If This Suit Could Not Theretofore Have Been Maintained for Lack of Consent of the Sovereign Despite the Unlawful Withholding of Respondents' Property, the New Administrative Procedure Act Has Constituted Consent by Congress to the Maintenance of the Action 107

Point Three : The Case Cannot Properly Be Disposed of Summarily Upon Matters Outside the Complaint, Either Upon the Merits or the "Jurdisdiction" 113

I. No Summary Judgment Could Have Been Granted on the Merits Because of the Presence of a Genuine Issue of Fact 114

The Affidavits Come Close to Demanding a Summary Judgment for Respondents 116

II. A Disposition of the Jurisdictional Issue by Summary Determination of the Facts Is Not Proper 118

Conclusion 125

Appendix I ..... App. 1

Appendix II ..... App. 17

Table of Authorities Cited

CASES

	Pages
Acadian Production Corp. v. Land, 136 F.2d 1 (5 Cir.)	115
Adams v. United States, 319 U.S. 312	40
Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607	33
Alma Motor Company v. The Timken-Detroit Axle Company, 328 U.S.	23, 25
American Fibre Reed Co., In re, 206 Fed. 309	69n
American States Public Service Co., In re, 12 F. Supp. 667	32
Anderson Bros. Mfg. Co. v. Larson, 61 N.E.2d 410 (Ill. App.)	70
Ann Arbor Railroad Co. v. United States, 281 U.S. 658	25
Arenas v. United States, 322 U.S. 419	114
Atchison, etc. Railway Co. v. O'Connor, 223 U.S. 280	106
Atwood v. National Bank of Lima, 115 F.2d 861 (6 Cir.)	20
Ayres, In re, 123 U.S. 443	99, 101
Ballard v. MacCallum, 15 Cal.2d 439, 101 Pac.2d 692	43
Barry v. United States, 279 U.S. 597	47
Belknap v. Schild, 161 U.S. 10	105
Bell v. Preferred Life Assurance Society, 320 U.S. 238	21
Bickel v. Wessinger, 58 Ore. 98, 113 Pac. 34	50n
Blake v. McKim, 103 U.S. 336	38n
Blondet v. Hadley, 144 F.2d 370 (1 Cir.)	74, 87
Board of Liquidation v. McComb, 92 U.S. 531	93
Boeing Air Transport v. Farley, 75 F.2d 765	99, 101
Borden's Co. v. Baldwin, 293 U.S. 194	124
Borland v. Nevada Bank, 99 Cal. 89, 33 Pac. 737	91
Bowen v. Johnston, 306 U.S. 19, 29	40
Bowers v. E. J. Rose Mfg. Co., 149 F.2d 612 (9 Cir.)	21n, 114
Brick v. Brick, 98 U.S. 514	59, 62, 68, 92n
Brierley v. Commercial Credit Corp., 43 F.2d 724, cer. den. 282 U.S. 897	24
Brown v. Fletcher, 237 U.S. 583	23
Brown v. Gaffney, 28 Ill. 149	68n
Brown v. New York Life Ins. Co., 22 F. Supp. 82	69, 76, 77
Bumiller v. Bumiller, 179 Cal. 119, 175 Pac. 897	77
Burroughs v. Bayne, 5 H & N 296	89
Cabrera v. American Colonial Bank, 214 U.S. 224	44, 59, 68
Campbell v. Dearborn, 109 Mass. 130	51n

Pages

Carter v. Carter Coal Co., 298 U.S. 238 31
Cassem v. Heustis, 201 Ill. 208, 66 N.E. 283 ..... 54n, 64
Central Mexico Light & Power Co. v. Munch, 116 F.2d 85 (2 Cir.) ... 120
Chance v. Jennings, 159 Mo. 544, 61 S.W. 177 ..... 66, 68n
Chapin v. Tampoorlos, 325 Ill. App. 219, 59 N.E.2d 334 ..... 69, 77
Chase v. United States, 155 U.S. 489 25
Cherry Cotton Mills v. United States, 326 U.S. 705 107
Chicago Metallic Mfg. Co. v. Edward Katzinger Co., 123 F.2d 518 (7 Cir.) 21n
City of Parkersburg v. Brown, 106 U.S. 487 27
Clarke v. Fast, 128 Cal. 422, 61 Pac. 72 ..... 65, 68
Colby, Mary A., v. Title Insurance and Trust Company, 160 Cal. 632, 117 Pac. 913 27
Coleman v. Fidelity Finance Co., 18 La. App. 422, 137 So. 584 78
Conant v. Riseborough, 139 Ill. 383 ..... 51n
Continental Bank & Trust Co. v. Bouterie, 169 So. 812 (La.) 52
Continental Collieries, Inc. v. Shober, 130 F.2d 631 (3 Cir.) 21n
Conway v. Alexander, 7 Cranch 218 ..... 56, 67
Correa v. Barbour, 71 Fed.2d 9 (1 Cir.) 85
Cross v. Eureka Lake, etc. Canal Co., 73 Cal. 302, 14 Pac. 855 76
Cummings v. Deutsche Bank, 300 U.S. 115 112
Cunningham v. Macon & Brunswick R. Co., 109 U.S. 446 ..... 84, 105

Davis, The, 10 Wall. 15 112
Davis v. Gray, 16 Wall. 203 92
Davis v. Schackleford, 91 F.2d 148 ..... 121, 123
Dean v. Radford, 137 Mich. 617, 101 N.W. 598 68
DeLoach v. Crowley's Inc., 128 F.2d 378 (5 Cir.) 21n
Detroit Trust Co. v. First National Bank-Detroit, 7 F. Supp. 117 78
Dickens v. Heston, 53 Idaho 91, 21 Pac.2d 905 ..... 50, 66, 67
Dioguardi v. Durning, 139 F.2d 774 (2 Cir.) 21n
Douglas v. Noble, 261 U.S. 165 47
Downey v. Palmer, 114 F.2d 116 (2 Cir.) 21n
Dugan v. United States, 3 Wheat. 172 36

E. I. du Pont de Nemours & Co. v. Claiborne-Reno Company, 64 F.2d 224 (8 Cir.) 46

Farrall v. District of Columbia Amateur Athletic Union, 153 F.2d 647 (C.A., D.C.) 114
Farrow v. Work, 39 Okla. 734, 136 P. 739 50

	Pages
Federal Housing Administration v. Burr, 309 U.S. 242	107
Federal Trade Commission v. American Tobacco Co., 264 U.S. 298	25
Gallup v. Caldwell, 120 F.2d 90	120
Gibbs v. Buck, 307 U.S. 66	5, 13
Gilbert v. David, 235 U.S. 561	121
Goldberg v. Daniels, 231 U.S. 218	99, 101
Golden v. Fischer, 27 Cal. App. 271, 149 Pac. 797	68, 92n
Gorham Manufacturing Co. v. Wendell, 261 U.S. 1	97
Gravenhorst v. Zimmerman, 236 N.Y. 22, 139 N.E. 766	114
Great Northern Ins. Co. v. Read, 322 U.S. 47	75, 93, 94, 95, 106n, 119
Great Northern Railway Co. v. Delmar Co., 283 U.S. 686	24
Hackfeld and Co. v. United States, 197 U.S. 442	38
Hagood v. Southern, 117 U.S. 52	99, 101
Hart v. United States, 91 Ct.Cl. 308	110
Henderson v. Glosser, 46 F. Supp. 458	115
Hickox v. Lowe, 10 Cal. 197	50
Hirabayashi v. United States, 320 U.S. 81	47
Hodgkins v. Wright, 127 Cal. 688, 60 Pac. 431	63
Hodgson v. Burroughs, 175 Md. 413, 2 Atl.2d 407	69, 76, 77
Home Bond Co. v. McChesney, 239 U.S. 568	69n
Horn v. Klatt, 65 Cal. App.2d 310, 151 Pac.2d 149	77, 89n
Hudkins v. Crim, 72 W.Va. 418, 78 S.E. 1043	68
Huntington v. Laidley, 176 U.S. 668	122
Ickes v. Fox, 300 U.S. 82	73, 85, 101, 102
Illinois Central R. R. Co. v. Adams, 180 U.S. 28	118, 122
Judge v. Reese, 24 N.J.Eq. 387	51n
Karl Kiefer Machine Co. v. United States Bottlers Machinery Co., 113 F.2d 356 (7 Cir.)	21n
Kiefer & Kiefer v. Reconstruction Finance Corporation, 306 U.S. 381	38, 106
Kirk v. United States, 131 Fed. 331, aff'd 204 U.S. 668	110
Klebe v. United States, 263 U.S. 188	110
KVOS, Inc. v. Associated Press, 299 U.S. 269	122
La Prade, Ex parte, 289 U.S. 444	97
Larkin v. Saffarans, 15 Fed. 147	112

Pages

Latta v. Tutton, 122 Cal. 279, 54 Pac. 844 77
LeComte v. Pennock, 61 Kan. 330, 59 Pac. 641 ..... 51n, 64
Leimer v. State Mutual Life Assurance Co. of Worcester, Mass., 108 F.2d 302 (8 Cir.) 21n
Lewis v. Wells, 85 Fed. 896 ..... 64, 68n
Louisiana v. Garfield, 211 U.S. 70 ..... 103, 104
Louisiana v. Jumel, 107 U.S. 711 ..... 101, 106
Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc., 131 F.2d 419 (8 Cir.) 21n
Lynch v. Ryan, 132 Wis. 271, 111 N.W. 707 ..... 51n, 64, 65, 68
Lynch v. United States, 292 U.S. 571 112

MacNamara v. Culber, 22 Kan. 661 50
Magruder v. Belle Fourche Valley Water Users Assn., 219 Fed. 72 (8 Cir.) 73, 93
Manufacturers Trust Co. v. Chas. Schroeder & Son Co., 224 Wis. 580, 271 N.W. 915 69
Marshall v. Thompson, 39 Minn. 137, 39 N.W. 309 ..... 51n, 65, 66
Martin v. Bankers Trust Co., 18 Ariz. 55, 156 Pac. 87 ..... 69n
Martin v. Hunter's Lessee, 1 Wheat. 304 112
Marx v. American Malting Co., 169 Fed. 582 48
Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 124
McLeod v. Bank of St. Louis, 122 U.S. 528 76
McNutt v. General Motors Acceptance Corp., 298 U.S. 178 122
Meyer v. Thomas, 18 Cal. App.2d 299, 63 Pac.2d 1176 ..... 68, 77
Mine Safety Co. v. Forrestal, 326 U.S. 371 ..... 73, 93, 99
Minnesota v. Hitchcock, 185 U.S. 373 ..... 103, 104
Montgomery v. Spect, 55 Cal. 352 ..... 51n, 67
Morgan's Assignees v. Shinn, 15 Wall. 105 68
Morris v. Nixon, 1 How. 118 ..... 56, 66, 67
Morrison v. Work, 266 U.S. 481 ..... 85, 103, 104
Mount Tivy Winery v. Lewis, 134 F.2d 120 (9 Cir.) 69, 77
Mount Tivy Winery v. Lewis, 42 F. Supp. 636 (D.C. Cal.) 76
Murray v. Butte-Monitor Tunnel Mining Co., 41 Mont. 449, 110 Pac. 497 ..... 66, 67, 68, 92n
Murray v. Farmers and Merchants Bank, 206 S.W. 577 77
Myers v. Bethlehem Corp., 303 U.S. 41 ..... 3n, 122

Naganab v. Hitchcock, 202 U.S. 473 103
Nielson v. Lagow, 12 How. 98 34
Noonan v. Gilbert, 68 F.2d 775 (Ct. of App., D.C.) 27

Pages

Northern Pacific Railway v. North Dakota, 250 U.S. 135 74
Northern Securities Co. v. United States, 193 U.S. 197 33

O'Neill v. Capelle, 62 Mo. 202 ..... 59n, 64
Oregon v. Hitchcock, 202 U.S. 60 ..... 103, 104, 122
Osborn v. United States Bank, 9 Wheat. 737 106

Package Closure Corp. v. Sealright Co., Inc., 141 F.2d 972 (2 Cir.) 21n
Panama Mail S.S. Co. v. Vargas, 281 U.S. 670 124
Panama Refining Co. v. Ryan, 293 U.S. 388 32
Pearson v. United States, 267 U.S. 423 110
People v. Robinson, 107 Cal. App. 211, 290 Pac. 47 68
People v. Tambara, 192 Cal. 236, 219 Pac. 745 77
Peugh v. Davis, 96 U.S. 332 ..... 56, 59, 62, 64, 65, 67
Philadelphia Co. v. Stimson, 223 U.S. 605 ..... 73, 85, 86
Pierce v. Robinson, 13 Cal. 116 ..... 59, 62
Polk Company v. Glover, 305 U.S. 5 ..... 5, 13, 23
Provost v. United States, 269 U.S. 443 38
Publicity Bldg. Realty Corp. v. Hannegan, 139 F.2d 583 (8 Cir.) 21n, 124
Pugh v. McCormick, 14 Wall. 361 112

Red River Cattle Co. v. Needham, 137 U.S. 632 121
Reynolds v. United States, 70 F.2d 39 (7 Cir.) 47
Robbins v. Pacific Eastern Corporation, 8 Cal.2d 241, 65 Pac.2d 42 24
Rockwell v. Humphrey, 57 Wis. 410, 15 N.W. 394 ..... 51n
Rolston v. Missouri Fund Commissioners, 120 U.S. 390 93
Rossiter v. Vogel, 134 F.2d 908 (2 Cir.), 148 F.2d 292 ..... 21n
Ruby v. West Coast Lumber Co., 139 Ore. 338, 10 Pac.2d 358 52
Russell v. Southard, 12 How. 139 ..... 56, 59, 61, 62, 67

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 114
Schmitt v. Wright, 317 Ill. App. 384, 46 N.E.2d 184 69
Sewing Machine Companies Case, 85 U.S. 553 ..... 38n
Simpson v. First National Bank, 93 Fed. 309 (8 Cir.) 65
Sloan Shipyards v. U. S. Fleet Corporation, 258 U.S. 549 79
Smith v. Becker, 192 Mo. App. 597, 184 S.W. 943 ..... 51n, 66, 69n, 92
Smith v. Berry, 155 Ky. 688, 160 S.W. 247 ..... 68n
Smith v. Doyle, 46 Ill. 451 66
Smith v. Reeves, 178 U.S. 436 ..... 88, 93, 105n, 106
Sparks v. Caldwell, 157 Cal. 401, 108 Pac. 276 92
Sparks v. England, 113 F.2d 579 (8 Cir.) 21

Pages

Stark v. Wickard, 321 U.S. 288 1
St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283 ..... 120n, 121
Steigleder v. McQuesten, 198 U.S. 141 121
Stein v. Archibald, 151 Cal. 220, 90 Pac. 536 55
Stone v. Church, 16 N.Y.S.2d 512 89
Sullivan v. Lewis, 170 Was. 413, 16 Pac.2d 834 69
Susman v. Whyard, 149 N.Y. 127, 43 N.E. 413 ..... 69n
Sutphen v. Cushman, 35 Ill. 186 ..... 63, 65

Tahir Brk v. Glenn L. Martin Co., 116 F.2d 865 (4 Cir.) 5, 20
Tindal v. Wesley, 167 U.S. 204 ..... 74, 85, 95, 96
Tracy v. Stock Assurance Bureau, 132 Cal. App. 573, 23 Pac.(2d) 41 ..... 76, 92
Transcontinental & Western Air v. Farley, 71 F.2d 288 ..... 99, 101, 122

Union Securities Inc. v. Merchants Trust & Savings Co., 205 Ind. 129, 185 N.E. 150 ..... 69n
United States v. Alire, 6 Wall. 574 110
United States v. Ballard, 322 U.S. 78 23
United States v. Bradley, 10 Pet. 343 ..... 34, 35
United States v. Broderick, 59 F. Supp. 189 ..... 114, 115
United States v. Cooper Corporation, 312 U.S. 600 36
United States v. Ferguson, 78 Fed. 103 (2 Cir.) 106
United States v. G. Falk & Brother, 204 U.S. 143 38
United States ex rel Shoshone Irrigation District v. Ickes, 70 F.2d 771 ..... 99, 101
United States v. Jones, 131 U.S. 1 110
United States v. Lee, 106 U.S. 196 ..... 19, 73, 74, 79, 81, 82, 84, 85, 86 90, 94, 95, 96, 97, 107, 110n, 111
United States v. Linn, 15 Pet. 290 35
United States v. The Peggy, 5 Cranch 102 112
United States v. Peters, 5 Cranch 115 106
United States v. Thompson, Fed. Cas. No. 16,487 (D.C., E.D.Penn) 52
United States v. Tichenor, 12 Fed. 415 26
Utah Power & Light Co. v. Pfost, 286 U.S. 165 47

Veatch v. Standard Oil Co., 49 F. Supp. 45 115
Villa v. Rodriguez, 12 Wall. 323 ..... 56, 62, 65, 67
Virginia Coupon Cases, 114 U.S. 270 ..... 92, 93, 105

Pages

Walsh v. Walsh, 18 Cal.2d 439, 116 Pac.2d 62 114
W. A. Ross. Const. Co. v. Yearsley, 103 F.2d 589 (8 Cir.) 79
Watts, Watts & Co. v. Unione Austriaca, etc., 248 U.S. 9 112
Wells v. Roper, 246 U.S. 335 ..... 99, 100
Western Underwriting & Mortgage Co. v. Vailey Bank of Phoenix, 237 Fed. 45 (9 Cir.) 69
Wetmore v. Rymer, 169 U.S. 115 ..... 121, 123, 124
Wilcox v. Edwards, 162 Cal. 455, 123 Pac. 276 76
Williams v. Chadwick, 74 Conn. 252, 50 Atl. 720 ..... 69n
Williams v. International Harvester Co., 172 Ore. 270, 141 Pac.2d 837 78
Worcester County v. Riley, 302 U.S. 292 ..... 80n

Yazoo & Mississippi Valley Railroad Co. v. Thomas, 132 U.S. 174 ..... 31, 32
Yule v. Bishop, 133 Cal. 574, 65 Pac. 1094 ..... 55n

Ziffrin, Inc. v. United States, 318 U.S. 73 112

STATUTES AND RULES

Act of March 2, 1861, C. 84, Sec. 10 26
Act of March 3, 1875 ..... 120n
Administrative Procedure Act (Public Law 404—79th Congress, Chapter 324—2d Session) 19, 108, 109, 110, 111, 112

California Civil Code:
Section 1474 54
1477 ..... 54, 55
1641 46
2888 91
3110 ..... 46, 52

15 C.J.S. 237 96

18 D.C. Code, Sec. 41 1
Ch. 2, Sec. 260 2

Executive Order No. 6166 35

Federal Tort Claims Act (Public Law 601—79th Congress) 108, 110, 111

Judicial Code, Section 37 ..... 120, 121, 123

Legislative Reorganization Act of 1946, Title IV, Section 401, et seq. 108

	Pages
Merchant Marine Act of 1920	38
Section 38	39
Merchant Marine Act of 1928	6
Merchant Marine Act of 1936	7, 32, 39, App. 1
Section 101	31
202	28, 29, 33
207	27, 28, 29, 30, 32, 33, 36, 113
215	27, 29, 30, 33
602	36
New York Civil Code:	
Section 700	55n
703	55n
Rules of Civil Procedure:	
Rule 8(a)	42n
8(e)(2)	22
12(b)	113n, 115, 123n
15	21
52	15
56	123
56(c)	114
56(e)	116
75(d)	5
18 Stat. 470	120n
27 Stat. 434	1, 2
49 Stat. 1921	1
Suits in Admiralty Act	37
Tucker Act	110
Uniform Joint Obligations Act, Sec. 3	54
Uniform Negotiable Instruments Act, Sec. 29	43, 52
United States Code:	
Title 28, Section 230	110
31, Section 194	35
31, Section 198	35
41, Section 11	26, 111
41, Section 14	111
46, Section 11	36
46, Section 101	31

Pages

46, Section 741, et seq. 37
46, Section 802 ..... 36, 39
46, Sections 808, 864 ..... App. 12
46, Section 1112 28
46, Section 1117 ..... 27, 28
46, Section 1125 28
46, Sections 1141-1143 ..... 7, App. 1
46, Sections 1171-1182 ..... 7, 36
46, Section 1244 36

TEXTS AND MISCELLANEOUS

Advisory Committee's "Report of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States," Rule 12, submitted under date of June 14, 1946 (reported at 5 F.R.D., p. 436 et seq.) 21, 113n, 115, 123n

American Jurisprudence:
Vol. 41, Sec. 27, p. 603 76
50, p. 312 ..... 38n

Attorney General, Opinions of:
Vol. 4, p. 600 26
9, p. 18 26
11, p. 201 26
15, p. 235 26
19, p. 650 26
31, p. 597 26
33, pp. 575, 576 ..... 36, 39

18 Comptroller General 262 30

Comptroller General's Annual Report to Congress for the fiscal year ending June 30, 1940 ..... 24, 40

House Report No. 1980 (79th Congress, 1st Session) 109

I Jones on Mortgages (8th ed.), Section 317, pp. 394, 395 66

Moore's Federal Practice.
Vol. 1, pp. 260-264 ..... 113n
1, pp. 546-553 ..... 42n
1, 1945 Cumulative Supplement, pp. 177-180 114
1, 1945 Cumulative Supplement, pp. 209-211 ..... 42n
3, p. 3184 114

	Pages
Pomeroy's Equity Jurisprudence (5th edition):	
Vol. 4, Sec. 1193, pp. 568, 570	60, 61
1195, p. 576	50
1196, pp. 582, 583 (Note 16)	44
1229, p. 685	76
1231, p. 688	77
Report of the House Committee on Merchant Marine and Fisheries on bill amending Section 207 of Merchant Marine Act of 1936	29
Report to the House on the Legislative Reorganization Act of 1946	108
Restatement of the Law of Contracts, Sec. 120	53
Comment on Subsec. (2)	53n
California Annotations to Section 120	54
Restatement of the Law of Security:	
Section 24	77
37	77, 78
Restatement of the Law of Torts:	
Chap. 9, Topic 2, Scope Note	89
Section 221	89
222	89
223	77, 89
223, Comment on Clause g	89
224, Comment a	78
237	77, 78
Schouler on Personal Property (5th ed.), Sec. 411(a), p. 618	77
Senate Document No. 248 (79th Congress, 1st Session), pp. 195, 211, 214	109
Senate Report No. 752 (79th Congress, 1st Session)	109
Story on Bailments (9th edition):	
Section 122, p. 129	77
287	76
339, p. 303	76
341, p. 306	76
345, pp. 308, 309	76
2 Story on Equity Jurisprudence, Secs. 1018(b) and 1019	64
Street, Foundations of Legal Liability:	
Vol. 1, p. 231	78
1, pp. 242, 243	78
1, pp. 246, 248, 249	77
3, p. 160	89
5 Uniform Laws Annotated, Sec. 29, pp. 409, et seq.	52n

	Pages
Williston on Contracts (Rev. Ed.):	
Vol. 2, Sec. 341, pp. 1008-1011	54
3, Sec. 619, pp. 1781, 1782	45, 48
3, Sec. 620, pp. 1786, 1787	43
3, Sec. 771, pp. 2171, et seq.	59

In the Supreme Court of the United States

OCTOBER TERM 1946

No. 207

EMORY S. LAND, etc., et al., *Petitioners,*

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, et al., *Respondents.*

BRIEF FOR RESPONDENTS

Statement of the Case

1. JURISDICTION

This action was begun in the District Court for the District of Columbia. As the defendants were residents of the District (R. 2; Compl. para. 8), that court had jurisdiction under 18 D.C. Code, Sec. 41 as amended, 49 Stat. 1921 (cf. *Stark v. Wickard*, 321 U.S. 288). From the judgment of the District Court an appeal was taken to the Court of Appeals for the District of Columbia, under the Act of February 9, 1893, 27

All emphasis in quotations has been added, unless otherwise noted.

Stat. 434 as amended and as incorporated in D.C. Code, Title 18, Chapter 2, Section 260. After decision of the Court of Appeals, this Court granted certiorari.

2. THE PROCEEDINGS

The respondents were the plaintiffs in the District Court and the appellants in the Court of Appeals. Petitioners were the defendants in the District Court and appellees in the Court of Appeals.

The District Court dismissed the complaint, with prejudice, of its own motion (R. 79). At the time it took this action, the only pleading on file was the complaint. Issue had not yet been joined (and never has been), no motions had been made by defendants, and the case was before the court merely on the plaintiffs' motion for a temporary injunction.

The only papers filed in the District Court by the defendants prior to the dismissal were certain *ex parte affidavits*, and these had been presented only in opposition to the application for temporary injunction (so recited in the judgment, R. 79, and by counsel at the time of offering them, R. 113, and see R. 82). The District Court made no findings. From its judgment of dismissal (R. 79) the plaintiffs appealed (R. 81).

The Court of Appeals reversed and ordered the cause remanded, so that issue might be joined and the case determined on its merits (R. 171, 172). Its opinion is reported at 154 F.2d 307.

3. THE ISSUES PRESENTED

The basis of the trial court's dismissal, as revealed by a remark from the bench (R. 152), was that, without consideration of the truth or falsity of any allegation of the complaint, the suit was one against the United States.

In the Court of Appeals the petitioners contended both (1) that the action was one against the United States and

therefore beyond the jurisdiction of the court for lack of consent to be sued, and (2) that the complaint did not state a claim upon which relief could be granted. But in this court petitioners no longer *openly* contend that the complaint fails to state a claim for relief, and they *purport* to rest solely on their so-called jurisdictional contention. Nevertheless, underlying every argument made by them on the "jurisdictional question" will be found either or both of two bland assumptions: (1) that the complaint does not state the claim for relief which we say, and the Court of Appeals held, that it asserts; and (2) that the *ex parte* affidavits introduced by petitioners in the District Court conclusively refuted the allegations of the complaint and, without the necessity of any trial, established as a fact that the respondents have no cause of action. The case is discussed by petitioners as if there had been trial of fact and a general verdict in their favor, and they proceed as if they are therefore now entitled to select from their affidavits whatever items of "fact" support such a general verdict.[1] Consequently, they proceed upon a course in direct opposition to the correct procedure; since this case is here on a dismissal of the complaint without trial, every inference of fact must be drawn in favor of the plaintiffs.

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[1]Indeed, in their petition for a writ of certiorari, in footnote 8, p. 12, they presented a curious inversion of regular procedure in the statement:

> "Since the court below settled the jurisdictional defense adversely to petitioners, further proceedings in the district court would necessarily consist of a formal trial to establish facts already of record."

We replied thus (Brief in opposition, footnote 13, p. 17):

> "Facts are to be established by trial; trials may not be avoided by prejudging facts. Plaintiffs are entitled to a trial to introduce their evidence in an orderly way. Cf. *Myers v. Bethlehem Corp.*, 303 U.S. 41, at 51, 52: 'Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.' "

In footnote 9, p. 12, of their present brief petitioners restate the same idea in slightly altered form.

The so-called "jurisdictional question" is spurious. As we shall show, if the plaintiffs prove their cause of action, the suit is not one against the United States; conversely, if they fail to establish their allegations, their cause will fail on the merits without reference to jurisdiction. In short, the jurisdictional question actually depends on the merits of the case. For that reason, we shall first discuss the question whether the complaint states a claim for relief and the nature of the claim asserted (pp. 20 to 70, infra). Once the nature of the claim so asserted is fully stated, every argument presented by the petitioners on the "jurisdictional question" is revealed for what it is, as question-begging, unjust, and unsound.

We shall then directly consider the "jurisdictional question" (pp. 70 to 112, infra). The greater part of petitioners' brief is devoted to a discussion of the right to refer to their affidavits, all of which is irrelevant, as we shall show (at pages 12 to 17, infra, and pp. 113 to 125, infra).

Under the heading "Question Presented" petitioners' brief states three questions. The inappositeness of the first is shown at pages 16, 17, infra, and in Point Three of our Argument. The third question is considered at pages 107-112, infra. The second question approaches a question actually present, but as stated it involves false assumptions (see discussion at p. 12, infra). We state the true questions at page 17, infra.

4. THE FACTS

Petitioners' brief contains a "statement" of purported "facts" which, except for its description of the complaint, are culled almost exclusively from the *ex parte* affidavits filed by them in opposition to the motion for a preliminary injunction. As we later show (pp. 12-17, infra), these affidavits were not considered by the court when it dismissed the complaint *sua sponte*. The

assertions and elaborations selected by petitioners from these affidavits may not be considered, "as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction." *Gibbs v. Buck*, 307 U.S. 66, 76; *Polk Company v. Glover*, 305 U.S. 5, 8. That issue is not before this Court; in appealing, plaintiffs designated under Rule 75(d) of the *Rules of Civil Procedure* only one point on which they intended to rely on appeal, namely, that "The Court erred in dismissing the Plaintiffs' complaint" (R. 81).[2]

Whether the complaint states a claim for relief and the nature of the claim may be determined only by reference to the complaint, the allegations of which must be accepted as true. *Tahir Erk v. Glenn L. Martin Co.*, 116 F.2d 865, at 867 (4 Cir.).

We therefore present a summary of the allegations of the complaint as the facts.

The suit was not brought against the United States government but against five individuals who were members of the United States Maritime Commission at the time the complaint was filed and who, acting without authority of law, were inflicting injury upon the plaintiffs by detaining their property and threatening to sell it to others. The action was brought to recover personal property consisting of shares of stock of American President Lines, Ltd., a private corporation, and the certificates representing the shares, and to enjoin sale to others *pendente lite*. It is alleged that plaintiffs are the owners and have been since before 1938, that in 1938 the corporation was indebted to the United States Maritime Commission for a large sum of money (R. 6, Compl. para. 30), that plaintiffs then pledged the shares to the Commission as collateral to secure

[2] And, as appellants, they designated for the record on appeal only the complaint, judgment, and appeal papers (R. 159). The petitioners, as appellees, required inclusion of the affidavits by counter-designation (R. 160).

the debt of the corporation (R. 6, Compl. para. 29, 30), that thereafter and before the complaint was filed the debt was paid in full, and that defendants, who had thus acquired possession, refuse to surrender the shares and threaten to sell them to others (R. 6, 7, Compl. para. 33, 34). It is alleged that in August 1938 the plaintiffs endorsed their certificates in blank and delivered them to the Commission under a written contract dated August 15, 1938, a copy of which is attached to the complaint as Exhibit A (R. 8).

Apart from that contract, it is conceded that respondents are the owners and entitled to possession of the property withheld by petitioners. The issue on the merits arises out of the claim of the petitioners that, by virtue of the contract, title to the property was conveyed outright, the respondents claiming and alleging in their complaint that it created only a pledge as security for the indebtedness.

(a) THE CIRCUMSTANCES IN WHICH THE CONTRACT OF AUGUST 15, 1938 WAS MADE.

For some years before 1928, respondent Dollar Steamship Line (hereafter referred to as "Dollar of California") was engaged in freight and passenger steamship services (R. 2; Compl. para. 9). Its successor, The Dollar Steamship Line Inc., Ltd. (hereafter referred to as "Dollar of Delaware"), extended and enlarged the service in the transpacific and round-the-world trades. (Dollar of Delaware and American President Lines, Ltd. are identical, the name having been changed some time after 1938 (R. 2, Compl. para. 10).) Dollar of Delaware entered into contracts with the United States under the provisions of the Merchant Marine Act of 1928, whereby it agreed to construct two transpacific liners, carry the mails, and maintain and develop steamship service on specified trade routes. To complete the vessels, it borrowed funds from the Shipping Board, and it did construct them (R. 2, 3; Compl. para. 10, 11).

Dollar of Delaware incurred indebtedness to the United States in reliance on these contracts, and it maintained the service required by the contracts until the United States cancelled its ocean mail contract on June 30, 1937 pursuant to the Merchant Marine Act of 1936. That Act provided for direct operating differential subsidies in lieu of ocean mail contracts (Title 46 *U.S.C.*, Sec. 1171-1182), and also provided for the settlement and payment of claims for damages arising out of the premature termination of the mail contracts (Title 46 *U.S.C.*, Sec. 1141-1143) (R. 3; Compl. para. 12).

But the Maritime Commission refused to grant an operating differential subsidy to Dollar of Delaware (R. 3; Compl. para. 12) until January 25, 1938. On that date, a temporary operating subsidy was granted, but only on condition that Dollar of Delaware be reorganized by a contribution to its capital of $500,000, a settlement by its trade creditors of their claims (R. 3; Compl. para. 13), and the release by other corporate creditors of their claims in return for new stock (R. 3; Compl. para. 14).

While claiming that the subsidy was inadequate and not in conformity with the standards prescribed by law (R. 4; Compl. para. 17), Dollar of Delaware was compelled to accede to the conditions prescribed and to accept the subsidy granted as an alternative to failure to maintain its service and to meet its obligations (R. 4; Compl. para. 18).

When this temporary subsidy expired six months later on July 25, 1938, an extension or renewal was refused, although the Commission knew that the company would be unable to carry on operations and meet its obligations as they accrued without the aid authorized by law (R. 4; para. 19).

During all this period Dollar of Delaware was indebted to the United States through the Maritime Commission for a large sum. By August 15, 1938 this amounted to approximately

$7,500,000 (R. 6; Compl. para. 30). As security, the Commission held a mortgage upon properties of Dollar of Delaware. As further security it held the personal obligation of two of the respondents for that part of the total indebtedness consisting of ship mortgage notes covering the acquisition of a number of steamships. These two respondents, R. Stanley Dollar and Dollar of California, were liable on the ship mortgage notes as "makers, co-makers, guarantors or endorsers,"[3] and their liability was that of sureties for the debt of the principal, Dollar of Delaware.

By August 15, 1938, Dollar of Delaware was faced with the alternative of failing to meet its obligations as they accrued, including the obligations to the United States itself, or submitting to the demand of the Commission that it enter into the contract, a copy of which is attached to the complaint as Exhibit A (R. 4, 5; Compl. para. 21, 22). Under that pressure, the contract was made, and the Maritime Commission then granted a five-year subsidy in a more adequate amount than the temporary six months' subsidy that had expired July 25, 1938 (R. 5, 6; Compl. para. 23, 24, 26).

(b) THE CONTRACT OF AUGUST 15, 1938.

The parties to the contract were Dollar of Delaware itself, a group of its stockholders,[4] certain creditors,[5] and the United

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[3]The quotation is taken from the recitals of paragraph 14 of the agreement between the plaintiffs and the Maritime Commission dated August 15, 1938, a copy of which is attached to the complaint as Exhibit A (R. 14). The facts as to the security appear from this exhibit.

[4]Dollar Steamship Line, The Robert Dollar Co., Admiral Oriental Line, R. Stanley Dollar, Executors of the Estate of J. Harold Dollar, H. M. Lorber, The Anglo California National Bank, Mortimer Fleishhacker. Herbert Fleishhacker is named as a party in the contract but is deleted in a Supplemental Contract dated August 28, 1938, copy of which is attached to the complaint as Exhibit B (R. 19). Hereafter, when we speak

States Maritime Commission. Respondents are some of these stockholders or their successors.

The stockholders agreed to transfer or cause to be transferred to the Commission 2,100,000 shares of B stock and 113,206 shares of A stock of Dollar of Delaware, part of which was subject to prior pledges, with certain rights of the Commission in respect to voting or securing release of certain of the shares subject to prior pledges. The stock to be transferred constituted 92% of the voting control of the company (R. 3, 4, Compl. para. 15; R. 5, Compl. para. 21). In consideration, the Commission agreed to release the liability of respondents R. Stanley Dollar and Dollar of California to the Commission as "makers, co-makers, guarantors or endorsers of the ship mortgage notes." However, there was no release or discharge of the indebtedness owed by Dollar of Delaware to the United States, nor was it reduced by one iota. Paragraph 14 of the contract (R. 13, 14) expressly provided that the indebtedness of the company remained unaffected.

Pursuant to the contract, the stockholders thereafter did transfer their shares to the Commission (R. 6; Compl. para. 28).

Although the preamble to the contract recited that a consideration for it was the granting by the Commission of a five-year operating differential subsidy, the contract itself expressly exonerated the Commission from any obligation whatever to make a subsidy grant and left the granting of a subsidy to the subse-

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of the Contract of August 15, 1938, we mean the contract as supplemented by the contract of August 28th.

Pacific Lighterage Corporation, Olympic Refining Company, Dollar Wharf and Warehouse Company, and Dollar Terminal Steamship Company.

quent judgment of the Commission (Contract, para. 23, R. 16).[6]

So far as this contract is relevant to the suit, it may be summarized as one whereby certificates representing 92% of the voting control of Dollar of Delaware were transferred to the Commission, and the latter undertook to release two of the transferring shareholders from co-liability on certain notes secured by ship mortgages.

(c) PAYMENT OF THE INDEBTEDNESS.

Thereafter, Dollar of Delaware paid all of its indebtedness to the United States, amounting to some $7,500,000 (R. 6; Compl. para. 27, 30).

The debt being paid, the owners were entitled to a return of all security and collateral. The respondents, the owners of the shares at the time of the 1938 transfer or their successors, demanded return of their property from the petitioners who were in possession, asserting that it had been held only as collateral for a debt then paid. The petitioners refused to surrender the shares (R. 5, 7; Compl. para. 29, 34).

(d) THE COMPLAINT ALLEGES THAT THE STOCK WAS TRANSFERRED IN 1938 AS COLLATERAL ONLY.

Respondents' complaint alleged that under the agreement of 1938 the transfer of the stock in Dollar of Delaware to the United States Maritime Commission was not an outright transfer of title but merely a transfer of the stock as collateral to secure the payment of the $7,500,000 indebtedness.

Thus in paragraph 29 (R. 6) it is alleged that "such transfer was in fact and in legal effect collateral security for the indebt-

[6]While the parties were free to withdraw from the agreement if a subsidy was not granted within sixty days, the granting of any subsidy, however small, would have satisfied the condition (R. 15, para. 21, 22 of Contract).

edness of the company to the United States Maritime Commission." Paragraph 30 also states that the "shares were transferred as collateral security" for the indebtedness.

Stating the matter somewhat differently, it is the respondents' position that *the transfer of their stock in 1938 was a mere substitution of collateral to secure the indebtedness of Dollar of Delaware.* A portion of that indebtedness had originally been secured by the personal liability of two respondents as "co-makers, guarantors or endorsers" of the indebtedness of the Dollar of Delaware. The release of their liability as such guarantors and the transfer of the stock was a mere substitution of collateral.

(e) THE COMPLAINT ALSO ALLEGES LACK OF AUTHORITY IN THE COMMISSION TO TAKE THE STOCK EXCEPT AS COLLATERAL.

The complaint further alleges that under the law the United States Maritime Commission was wholly without authority to acquire outright title to the stock of the Dollar of Delaware, and that its only legal authority with respect to acquisition of that stock was to acquire it as collateral for the purpose of protecting, preserving or improving collateral held by the Commission to secure indebtedness (R. 5, 6; Compl. para. 25, 31, 32).

(f) INSTITUTION OF THE SUIT.

After payment of the indebtedness, petitioners not only declined to return the property but offered the stock for sale to the public. The complaint also alleged that, unless restrained by injunction, petitioners would disperse it by sale to the public to respondents' irreparable injury (R. 7; Compl. para. 34-37).

(g) ASSERTION OF TITLE IN THE UNITED STATES.—IT IS PETITIONERS WHO MAKE THAT ASSERTION, NOT THE UNITED STATES.

In their brief the petitioners assert repeatedly, in a variety of ways—in their statement of the questions, their statement of facts, their summary of the argument, and throughout the argument—that the "United States" claims absolute ownership of the stock and that "the complaint alleges possession of the stock by petitioners under a claim of absolute ownership by the United States." The petitioners thereby beg the issue and erroneously state the facts. The allegation of the complaint is not that the United States claims title but that (R. 6, para. 29):

> "although such transfer was in fact and in legal effect collateral security for the indebtedness of the company to the United States Maritime Commission, nevertheless after the satisfaction of all of said debts and obligations to the United States, *the defendants have asserted and claimed,* and do now assert and claim that the United States is the lawful owners of the shares of stock so transferred by the plaintiffs to the United States Maritime Commission."

The claim that the United States has title is made by the individual petitioners as their defense against the charge of tortious violation of respondents' ownership and right of present possession. That assertion or claim has not been made by the United States in any form, anywhere, and the record discloses no such assertion or claim by it. It has been made only by counsel for petitioners by way of argument and by the petitioners. The United States *could* have asserted a claim of ownership by intervening. This it has *never* done.

5. THE CAUSE WAS DECIDED BY THE DISTRICT COURT ON THE COMPLAINT ALONE AND IN NO PART ON THE AFFIDAVITS.

As we have said (pp. 4, 5, supra), the affidavits were a part of the record only for the purpose of determining the propriety

of a temporary injunction. Petitioners would escape this fact and the decisions of this court in *Gibbs v. Buck*, supra, and *Polk Company v. Glover*, supra, by asserting (Brief, p. 20) that

> "the affidavits filed in this case were conceded to be of broader significance. Here the respondents did 'submit the case to be decided upon the merits upon the bill * * * and affidavits.'"

This assertion is based on the further assertion (Brief, p. 19) that

> "respondents expressed the opinion before the district court that there was no 'real dispute upon the facts', and that the proceeding raised 'really a question of law' (R. 148); they further suggested that the parties agree 'that this hearing may be deemed a hearing upon the merits of the case, and that a final decree instead of an interlocutory injunction, may be rendered at this time' (R. 148)."

We impale these assertions at once, for there is simply no basis in fact for them. When the cause came on for hearing on plaintiffs' application for a temporary injunction, the District Judge expressed doubt of his jurisdiction (R. 111) before the affidavits were even filed (R. 113), briefs were then received (R. 114), and a second hearing was held solely for oral argument on the jurisdictional question. At the first hearing, petitioners' counsel had stated that there was no issue of fact in the record and that "I do not think any such issue can be raised * * * even on an ultimate trial" (R. 112). Respondents' position on the subject of jurisdiction was the same in the District Court as in the Court of Appeals and in this Court (R. 117-148), namely, that the test of the court's power to proceed was exclusively the allegations of the complaint (R. 117).[7]

[7] Thus respondents' counsel said (R. 117):

> "The position of the plaintiffs is based upon the allegations of their complaint * * *. We will confine ourselves to those allegations for the purpose of discussing jurisdiction, for they alone are material to the Court's power to proceed."

The petitioners' position in the District Court was the same as that of respondents, i.e., that the question of jurisdiction turned on the allegations of the complaint. It was in this situation that respondents' counsel made the suggestion to which petitioners now refer. Respondents' counsel did not thereby submit the case upon the merits; he certainly did not submit it upon the petitioners' *ex parte* affidavits, in any part. He merely stated his belief that the case would present "no real dispute upon the facts" and that the parties should be able to agree on the facts and thus leave only a question of law so that the hearing could become a final hearing on the merits (R. 148).

If petitioners' counsel had accepted the suggestion, the parties would have attempted to state an agreed set of facts. But the suggestion was rejected immediately. Petitioners' counsel accused respondents' counsel of putting the "cart before the horse" in discussing the merits at all. He said (R. 149):—

> "* * * it is perfectly clear that the initial inquiry which must arise in this case is the inquiry whether or not the Court has jurisdiction of the subject matter of the suit"

and that

> "* * * it is not necessary at all, nor appropriate in determining the issue of jurisdiction, to determine the merits of the case first. Counsel [for respondents] would have this Court decide whether or not there is merit in the suit, and then determine whether or not there is jurisdiction in the Court."

Thereupon, petitioners' counsel attacked the court's jurisdiction on the very ground appearing in Part II of their brief in this court (pp. 29 et seq.):—that whatever the merits or facts of the case, the suit was one against the government on the theory that the United States had "colorable" claim to the stock, coupled with possession (R. 151), and counsel even declined to discuss whether the complaint stated a cause of action (R. 152). Issues of fact were never defined or discussed. Nowhere did respond-

ents agree that the *ex parte* affidavits stated the facts or that the cause was to be submitted on those affidavits. Nowhere did petitioners' counsel suggest that the case was being submitted upon those affidavits, which they expressly offered only in opposition to the motion for preliminary injunction (R. 113). The District Court gave no consideration to the affidavits in passing on the jurisdiction and dismissing the complaint. At the first hearing it had stated its doubt of its jurisdiction before the affidavits had even been offered, and at the conclusion of the second oral argument it stated that respondents' argument had not changed its mind (R. 152), and that:

> "* * * I think two things. One is that this transaction was legal, in the sense that the Commission had the legal right; and therefore I think it is inescapable that this is a suit against the United States and therefore that the complaint must be dismissed and the injunction dissolved" (R. 152).

The meaning of this statement is clear enough, namely, that because the District Court believed that the United States Maritime Commission had legal power to acquire the stock, therefore the suit was one against the United States regardless of any consideration of whether or not the particular transaction was or was not a pledge or a sale.

Had the District Court's decision rested on any consideration of matter outside the complaint, findings would have been appropriate (*Rules of Civil Procedure*, Rule 52). Yet neither party requested findings, and none were made. Moreover, the order was drafted with care to show that the affidavits had been received only in opposition to a motion for preliminary injunction and that the dismissal was on an independent ground. The form of the order leaves no room for dispute (R. 79):—

> "This cause having come on for hearing on plaintiff's motion for a preliminary injunction; affidavits having been filed in opposition to the motion for preliminary injunc-

tion; briefs having been submitted, and counsel for the parties having been heard on November 15 and December 20, 1945; it is hereby ordered, adjudged, and decreed that:

1. The application of plaintiffs for a preliminary injunction be, and it is hereby denied.

2. On the Court's own motion, the complaint be and is hereby dismissed with prejudice."

The Petitioners Did Not Contend in the Court of Appeals That the Affidavits Had Any Bearing on the Jurisdictional Question or That the District Court, in Dismissing for Lack of Jurisdiction, Relied Thereon. That Argument Is First Made in This Court.

In the Court of Appeals the contention made by petitioners to support their reference to the affidavits was (Appellees' Brief, p. 5, fn. 3) that "The affidavits are, of course, pertinent in considering the objections raised by appellee to the sufficiency of the complaint. *National War Labor Board v. Montgomery Ward & Co.*, 144 F. 2d 528, 531 (App. D.C.)." This was nothing more than an argument that the District Court's action was similar to a dismissal on a "speaking motion," which, like a motion for summary judgment, can only be granted if there is no genuine issue of fact. The Court of Appeals pointed out that there was a genuine issue of fact, and petitioners nowhere in their present brief deny that this is so.

It was not until their petition to this Court for a writ of certiorari that petitioners advanced the argument that the jurisdictional question here involved is, like jurisdictional questions of amount or citizenship, one which a District Court may try in advance of the main trial, or that the District Court here had engaged in any such jurisdictional trial or had disposed of the jurisdictional question, not on the complaint, but on evidence outside the complaint.

For this reason the first "question" stated by petitioners is non-existent. The Court of Appeals did not, as petitioners allege, hold that the District Judge was without power to "search the record" in dismissing an action on jurisdictional grounds or that the District Court "should * * * have rejected these affidavits." These questions were never presented to the Court of Appeals.

Strangely enough, while petitioners argue at length the question of the District Court's power to try the jurisdictional question preliminarily, their brief nowhere claims that the affidavits support the dismissal on the merits and nowhere points out just how the affidavits support the dismissal on jurisdictional grounds. In Point Three of our brief (pp. 113 to 124, infra), we shall show that, even if they could properly be referred to, the affidavits do not and cannot possibly support the dismissal on any ground.

The Questions Presented

1. Where a complaint alleges (a) that at a given date the plaintiffs pledged certain stock with the United States Maritime Commission to secure an indebtedness, (b) that the Commission had no legal authority to purchase, i.e., acquire the stock except as security, (c) that the debt has since been paid, and (d) that the defendants retain possession and refuse to return the stock to the plaintiffs, is a claim for relief stated?

2. Is such an action against individuals to recover possession an action against the Government because the defendants are Government officials who, or whose predecessors, originally obtained possession under the pledge and now assert as their defense that the stock is the property of the United States?

3. If so, has not consent to maintenance of the suit been granted by the *Administrative Procedure Act* (1946)?

Summary of the Argument

I. With Respect to the Question Whether the Complaint States a Claim for Relief and Its Nature.

Congress conferred on the Commission no power to buy corporate stock but only to acquire stock as collateral. The Commission therefore acquired on behalf of the United States no more than the law empowered it to acquire. Additionally, the transaction was in fact only a pledge by way of substitution of collateral. The 1938 contract does not purport to be a sale but contains on its face compelling indicia that it was only a security transaction, for example, express provisions that there was to be no reduction of the principal indebtedness as the result of the alleged transfer of title. Moreover, any transfer, even if it appears on its face to be absolute, may only be a transfer by way of security and may always be shown to be such. Extrinsic facts alleged in the complaint support that construction. A suit on the theory that a transfer was by way of security is not one to reform or alter the contract but proceeds on the basis of the real transaction of the parties. The allegations of the complaint that the contract was a pledge therefore control and entitle the plaintiffs to their day in court.

II. With Respect to the So-Called Jurisdictional Claim.

The jurisdictional question is spurious, for it is identical with the merits. For purpose of the question whether the suit is against the United States, the allegations of the complaint are taken as true. Judgment will not be *res judicata* with respect to the United States, because the suit is not one against it but is a possessory action against certain individuals based on their own wrongdoing in withholding possession from respondents. While it would be a defense for petitioners to establish at a trial that another, for whom they have acted as agent, has a right superior to respondents, the mere fact that they claim to act as agents for another and assert no personal interest is no defense, and the assertion that their principal is the government

and that it has title does not convert the case into one against the sovereign or defeat the jurisdiction. Respondents' rights are possessory and not based on contract with the United States or on a title derived from it. The case of *United States v. Lee*, 106 U. S. 196, is conclusive. The decaying doctrine of sovereign immunity is in disfavor and should not be extended to a type of case to which it has never had application. Moreover, even if the present suit were a suit against the Commission or the United States, the United States has given consent to the suit by the *Administrative Procedure Act*, which became effective September 11, 1946, after the Court of Appeals had rendered its decision.

III. With Respect to the Propriety of a Summary Disposition of the Case on the Basis of Petitioners' Ex Parte Affidavits.

The District Court did not in fact try any question on evidence outside the complaint and took no action on any factual question. Moreover, its power to base a dismissal *sua sponte* on matters outside the complaint is tested by the same principles as its power to grant a motion for summary judgment. Such a motion may be granted only if there is no genuine issue of any material fact and may not be perverted into a trial of disputed questions of fact upon affidavits. No summary judgment for petitioners on the merits was here possible, considering the nature of the respondents' claim for relief, and no such claim is now made. Indeed, if the affidavits could properly be considered, they would come close to demanding summary judgment for respondents. Since the factual issue on "jurisdiction" is identical with that on the merits, the court could not summarily dispose of the issue on affidavits under the guise of jurisdiction:—Dismissal for lack of jurisdiction on a preliminary trial requires proof to a legal certainty. Additionally, on the type of jurisdictional question involved here, i.e., whether sovereign immunity applies, the allegations of the complaint are taken as true.

ARGUMENT

POINT ONE

THE COMPLAINT STATES A CLAIM FOR RELIEF AGAINST THE INDIVIDUAL PETITIONERS

I.

PRELIMINARY:—THE TEST OF SUFFICIENCY OF A COMPLAINT

In considering whether a complaint states a claim for relief, the question is not whether the complaint is deficient as a matter of pleading but whether it reveals that a cause of action *cannot possibly* be stated. Otherwise a motion to dismiss does not lie. *Atwood v. National Bank of Lima*, 115 F.2d 861 (6 Cir.); *Tahir Erk v. Glenn L. Martin Co.*, 116 F.2d 865 (4 Cir.). In the *Tahir Erk* case, the court said (at p. 870):

> "Our primary consideration, in the instant case, has been with the type of deficiency which would admit a motion to dismiss. It is our considered opinion that the motion to dismiss for insufficiency is applicable, as a general rule, only where it is clear and apparent to the court that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the specific claim. Leimer v. State Mut. Life Assur. Co., supra, 108 F.2d at page 306."

Again (p. 869):

> "We are mindful that in weighing the validity of a motion to dismiss for insufficiency, the duty of the court is not to test the final merit of the claim in order to determine which party is to prevail. Our duty, rather, is to consider whether in the light most favorable to the plaintiff, and with every intendment regarded in his favor, the complaint is sufficient to constitute a valid claim."

In the Report to this Court by the Advisory Committee on the Proposed Amendments to the Rules of Civil Procedure, June 14, 1946, in the discussion under Rule 12 (reported at 5 F.R.D., p. 443, 2d col.), *Bell v. Preferred Life Assurance Society*, 320 U.S. 238, and numerous decisions of the Second, Third, Fourth, Fifth, Seventh and Eighth Circuits are listed as "reversing judgments to prevent final determination on mere pleading allegations alone."[8]

A fortiori, if a motion to dismiss would not lie, then here, where no motion to dismiss was made and no opportunity was given to amend to remove deficiencies because no deficiencies were pointed out, dismissal with prejudice for failure to state a claim was clear error and out of the spirit of Rule 15 of the *Rules of Civil Procedure*.

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[8] *Sparks v. England*, 113 F.2d 579 (8 Cir.);
Continental Collieries, Inc. v. Shober, 130 F.2d 631 (3 Cir.);
Downey v. Palmer, 114 F.2d 116 (2 Cir.);
DeLoach v. Crowley's Inc., 128 F.2d 378 (5 Cir.);
Leimer v. State Mutual Life Assurance Co. of Worcester, Mass., 108 F.2d 302 (8 Cir.);
Rossiter v. Vogel, 134 F.2d 908 (2 Cir.); 148 F.2d 292;
Karl Kiefer Machine Co. v. United States Bottlers Machinery Co., 113 F.2d 356 (7 Cir.);
Chicago Metallic Mfg. Co. v. Edward Katzinger Co., 123 F.2d 518 (7 Cir.);
Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc., 131 F.2d 419 (8 Cir.);
Publicity Bldg. Realty Corp. v. Hannegan, 139 F.2d 583 (8 Cir.);
Dioguardi v. Durning, 139 F.2d 774 (2 Cir.);
Package Closure Corp. v. Sealright Co., Inc., 141 F.2d 972 (2 Cir.);
So also the Ninth Circuit in, for example, *Bowers v. E. J. Rose Mfg. Co.*, 149 F.2d 612.

II.

THE GROUNDS UPON WHICH THE COMPLAINT STATES A CLAIM FOR RELIEF: THERE ARE TWO; EACH IS INDEPENDENTLY SUFFICIENT, BUT EACH SUPPORTS THE OTHER.

The ultimate issue in the case is whether the contract of August 15, 1938 worked a pledge or an outright sale and purchase of shares, i. e., whether it transferred a lien to secure a debt, or an outright title. If it did the latter, its legal nature was that of a sale and purchase, whatever the consideration for transfer of title, and we shall so refer to this alternative. In passing on the ultimate issue—pledge *or* sale—two questions are presented, one a question of law, the other a question of mingled law and fact:

1. Had authority been conferred by law on the Maritime Commission to acquire the stock of a private corporation, outright, or was not its power limited to the acquisition of stock as collateral to secure a debt?

2. Assuming that the Commission had the power to acquire an outright title, nevertheless what is the proper construction of the particular contract and transaction involved in this case?

Apart from form or artfulness of pleading and having regard, as we must, to substance only (cf. p. 20 to p. 21, supra), the complaint clearly raises both issues, the first in paragraphs 25, 31, and 32 (R. 5, 6), and the second in paragraphs 29 and 30 (R. 6). Rule 8(e)(2) of the *Rules of Civil Procedure* provides that a party may set forth two or more statements of a claim alternatively, whether consistent or inconsistent, and may do so in a single count. Moreover, these two claims are not inconsistent but independent claims, each leading to the same conclusion.

On the purely legal question, the Commission could acquire on behalf of the United States only what the law empowered

it to acquire, and, if Congress never conferred upon the Commission power to acquire the shares by purchase but only as security for a debt, then the Commission acquired the stock only as security regardless of the sort of transaction the parties in 1938 thought they were effecting.

The judgment of the Court of Appeals can be affirmed without deciding this first or legal issue, but it can be reversed only if that issue not only is decided but is decided adversely to respondents. If that issue is decided against our contention, the case is not thereby ended, because it would still be necessary to try and to decide the second issue, that of mingled law and fact. There is a third course, that of not deciding the legal issue at all at this time—at the pleading stage—but of deferring decision on it until the case has been clothed with form and body by a trial of the facts. (It has been said that grave questions should not be passed upon until essential facts have been determined, "and that determination requires a hearing in due course upon the issues raised by the pleading." Cf. *Polk Company v. Glover*, 305 U.S. 5, 10.) This was the alternative followed by the Court of Appeals. Under this course, the legal question may never reach this Court, for it can do so only if the question of fact is decided adversely to respondents (see analogy of *Alma Motor Company v. The Timken-Detroit Axle Company et al.*, 328 U.S. ....., No. 11, October Term, 1946). But if it does reach the Court, it will come in orderly process after trial with an opinion of the Court of Appeals on the subject, so that this Court may have the benefit of that court's views (*Brown v. Fletcher*, 237 U.S. 583; *United States v. Ballard*, 322 U.S. 78, 88).

At the present stage, the issue on the second question, that of fact, is simply whether the complaint *effectively* alleges that the transaction was a pledge.

The Two Grounds, Though Independent, Interact:—If There Is at Least Grave Doubt of the Legality of the Transaction if Construed as a Sale, and if It May Be Construed as a Transfer by Way of Security, It Should Be So Construed.

We shall show (at pp. 25 to 41) that, apart from any question of construction of the contract, the Commission had no power to acquire the stock except as collateral. Conversely, we shall show (pp. 41 to 70) that, apart from consideration of questions of power, the contract was no more than a security transaction. But, in addition, the two questions interact. If (1) the legality of purchasing the stock is at least subject to grave doubt, and (2) if the construction of the contract as a security transaction is a wholly tenable one, then the contract must be construed as a security transaction.

That the contract is susceptible of that construction will readily appear. That the power of the Commission to purchase the stock is at least subject to doubt is beyond dispute. It suffices for this purpose to note: (1) The opinion of the Comptroller General of the United States in his Annual Report to Congress for the Fiscal Year ending June 30, 1940, (p. 40, infra), and (2) the discussion at pages 25 to 41, infra.

It is universally held that where a contract may have two possible constructions, under one of which it is illegal, that consideration must be adopted which avoids illegality. *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686; *Brierley v. Commercial Credit Corp.*, 43 F.2d 724, cer. den. 282 U.S. 897; *Robbins v. Pacific Eastern Corporation*, 8 Cal.2d 241, 272, 65 Pac.2d 42, 58.

It follows that, where there is doubt of the legality of the transaction if construed in one of the two possible ways, the court should adopt the other construction in order to avoid the necessity of deciding the question of legality. The situation is identical in principle with the rule that courts will, if possible,

construe a statute, not only to avoid the conclusion that it is unconstitutional, but to avoid doubts on that score and to avoid a construction "which would bring into question the constitutionality of the statute." *Ann Arbor Railroad Co. v. United States*, 281 U.S. 658; *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 307; cf. *Alma Motor Company v. The Timken-Detroit Axle Company*, 328 U.S. ..., No. 11, October Term, 1946.

III.

FIRST GROUND ON WHICH THE COMPLAINT STATES A CLAIM FOR RELIEF:—THE LAW CONFERRED NO AUTHORITY ON THE MARITIME COMMISSION TO PURCHASE STOCK OF A PRIVATE CORPORATION; THE POWER OF THE COMMISSION WAS LIMITED TO THE ACQUISITION OF STOCK AS COLLATERAL TO SECURE A DEBT. IN FACT, THE COMMISSION WAS PROHIBITED FROM ACQUIRING THE SHARES EXCEPT AS COLLATERAL.

A. Lack of Authority to Purchase the Shares.

1. No Government Agency Can Act Beyond or Outside of Authority Granted by Statute, and if It Purports to Do So, Its Action Is Void.

It is elementary that no governmental agency may take any action except under express statutory authority or upon authority necessarily or naturally inferable from a duty imposed or an authority granted. Thus the authority of the Postmaster General to establish post offices carries no implied authority to lease property in which the Postmaster may carry on his activities (*Chase v. United States*, 155 U.S. 489).

Indeed, for many years it has been expressly provided (with certain exceptions in the case of the War and the Navy Departments) that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by

law or is under an appropriation adequate to its fulfillment" (Title 41 *U.S.C.*, Sec. 11, derived from Act, March 2, 1861, C. 84, Sec. 10).

The Attorney General has repeatedly advised that, unless the making of a contract is expressly authorized by law or an appropriation has been made to fulfill it, or unless authority is necessarily inferred from a duty imposed or an authority given, no authority exists for its making (4 *Opinions Attorney General* 600, and 9 *Opinions of Attorney General* 18), that it is not sufficient that the agent of the United States regards a particular contract as desirable (15 *Opinions Attorney General* 235; 19 *Opinions Attorney General* 650; 31 *Opinions Attorney General* 597), that the intention of Congress that the power be exercised should be so clearly expressed as to amount to an express authority, and that otherwise the exercise of the power by an executive department is illegal (11 *Opinions Attorney General* 201).

In *United States v. Tichenor,* 12 Fed. 415, the United States claimed that defendants had quitclaimed certain land to it. The court said (p. 421):

> "Neither did these conveyances of William and Elizabeth Tichenor have the effect to vest any interest in the premises in the plaintiff. * * * there was no authority upon the part of the grantee to purchase, and therefore they were as conveyances void and inoperative. By section 7 of the act of May 1, 1820, (3 St. 568: section 3736, Rev. St.,) relating to the treasury, war, and navy departments, it is provided that no land shall be purchased on account of the United States except under a law authorizing such purchase.' It is not claimed that there was any law authorizing any one to purchase this property, and without such authority the purchase was void. 11 Op. 202."

If, then, no authority was ever conferred on the United States Maritime Commission to acquire stock in private corporations except as security, any contract having the purpose or effect of transferring title by way of purchase rather than by way of pledge would be, to that extent, ineffective, void and incapable of conferring or divesting rights. If the Commission had no power or right in law to purchase stock, it could not, by making a contract of purchase, create the power or right to hold the stock. Lack of validity for lack of power cannot be waived by either party. *City of Parkersburg v. Brown*, 106 U.S. 487, 501; *Mary A. Colby v. Title Insurance and Trust Company*, 160 Cal. 632, 117 Pac. 913; *Noonan v. Gilbert*, 68 F.2d 775 (Ct. of App., D. C.).

2. Congress Conferred No Authority on the Maritime Commission to Acquire Stock in a Private Corporation Except as Collateral: —Section 207 of the Merchant Marine Act Here Considered.

No statute confers authority upon the United States Maritime Commission to acquire, purchase, hold or dispose of shares of stock in a private corporation other than as collateral for indebtedness. Petitioners concede in their brief (footnote 17, page 33) that "authority to acquire absolute title to the stock is not conferred on the Commission in specific language." Forced to point to some statutory authority, petitioners have relied only on Section 207 of the *Merchant Marine Act of 1936*, as amended (Title 46 *U.S.C.*, Sec. 1117), asserting that "such authority is encompassed in the over-all provisions contained in Section 207." (footnote 17, p. 33).

(a) The terms of Section 207 negative the existence of power.

Section 207 refutes petitioners' claim so clearly that we quote:

> "The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the

activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."

Clearly the section gives to the Commission only power to make contracts and disburse funds: (1) to carry on the activities authorized by the Merchant Marine Act, or (2) to protect, preserve or improve the collateral held by the Commission to secure indebtedness.

It conferred no power to take or retain title to personal property after the indebtedness for which it is collateral has been paid or to take title to it independent of the indebtedness itself.

(b) The legislative history of the Act negatives the power.

Six weeks before the execution of the contract of August 15, 1938, the Commission had no authority whatever to purchase the stock, and its power to acquire it as security was doubtful. *All this petitioners concede*, since they have predicated the Commission's authority on the amendment to Section 207 (Title 46 *U.S.C.*, Sec. 1117), enacted on June 23, 1938. What the amendment did was to add the words "and make such disbursements" and the words "or to protect, preserve or improve the collateral held by the Commission to secure indebtedness."

On that same day, June 23, 1938, Congress also enacted Section 215 of the Merchant Marine Act (Title 46 *U.S.C.*, Sec. 1125) which authorized the Commission to acquire *ships* by purchase or otherwise. On the same day Congress amended Section 202 of the *Merchant Marine Act* (Title 46 *U.S.C.*, Sec. 1112) to provide:

"The Commission may, upon such terms and conditions as it may prescribe in accordance with sound business

practice, make such extensions and accept such renewals of the notes and other evidences of indebtedness hereby transferred, and of the mortgages and other contracts securing the same, as it may deem necessary to carry out the objects of this chapter."

Sections 207, 215 and the amendment to 202 are to be read together. Each had for its purpose the extension of the Commission's authority in respect to the performance of *specific duties* and the exercise of *specific powers.*

In short, prior to June 23, 1938, the Commission was without authority to become the owner of ships. *A fortiori,* it had no power to acquire ships indirectly by acquiring the stock of a steamship line. Prior to June 23, 1938, its power to acquire stock in a corporation even as collateral was doubtful. We may fairly assume that the reason the Commission went to Congress for these amendments was to obtain authority to permit it to make an adjustment relative to the Dollar Steamship indebtedness. What it then obtained by way of authority was this:—(a) the authority to acquire ships[9] but not corporate stock, (b) the authority to extend indebtedness, and (c) the authority already thought to exist in the Commission and said to have been exercised by other governmental agencies, i. e., the power to protect and preserve collateral for indebtedness.

The specific purpose of Section 207 is so stated in the *Report of the House Committee on Merchant Marine and Fisheries* on the bill amending Section 207, as follows:

> "Section 3. This amends Section 207 of the Merchant Marine Act, 1936. Section 207 of the Act provides that the Commission may enter into such contracts, upon behalf of the United States, as may, in its discretion, be necessary to carry on the activities authorized by this Act, in the same

[9]Discussions about taking over ships in payment of the debt had occurred. Cf. Appendix to this brief, pp. 10-12.

manner that a private corporation may contract within the scope of the authority conferred by its charter.' The amendment adds that it 'may make such disbursements' as may, in its discretion, be necessary, 'to protect, preserve, or improve the collateral held by the Commission to secure indebtedness,' in the same manner as a private corporation. The amendment is designed to make clear a power which it is thought already exists in the Commission, but about which some doubt has been expressed. Under the act, the Maritime Commission has all the general and implied powers of a business corporation. The specific reference to the power of protecting and preserving the collateral mortgages, and so forth, held by the Commission is intended to make certain that the Commission possesses the power to advance or expend funds for the preservation of its collateral where found necessary or advisable. Such power has often been exercised by other Government lending agencies, such as the Reconstruction Finance Corporation. Without such authority, the Commission may find it impossible to protect its mortgage or other interest in vessels, and title to which is in a transitory state, or where vessels are operated by the companies which are financially embarrassed when such vessels, because of accident or otherwise, need to be repaired or salvaged before further operation."

According to a ruling of the Comptroller General, Section 207, as amended, gave no authority to purchase vessels (18 Comp. Gen. 262). The Comptroller General said "that authority evidently was not deemed sufficiently broad to vest in the Commission a general power to purchase vessels even for its own account," and cited the special provision passed by Congress to authorize the Commission to purchase vessels (Section 215). *A fortiori*, Section 207 gave no power to acquire stock except for collateral. The express grant, in Section 215, of the power to buy vessels emphasizes the absence of power to buy stock of

a corporation owning vessels. *Expressio unius est exclusio alterius.*

(c) Nothing in the spirit or preamble of the Act confers the power.

Failing to discover any specific grant of power to purchase, acquire or hold shares of stock in a private corporation except as collateral, petitioners fell back in the courts below upon the general assertion that in this case the acquisition of the shares was incidental to a "comprehensive program for rehabilitating, subsidizing, and maintaining the essential services of a shipping company in furtherance of a Congressional policy for fostering and maintaining an adequate domestic merchant marine"!

But the Merchant Marine Act confers on the Commission no power to initiate or carry out "comprehensive programs"; it says nothing about "rehabilitating" or "maintaining" essential services of a shipping company. The nearest approach to any such subject is the declaration of Congressional policy as a preamble in the first section (Section 101; Title 46 *U.S.C.*, Sec. 1101), which petitioners quote in their brief as one of the "statutes involved." But even that preamble contains nothing resembling the claimed powers.

In any case, a declaration of Congressional policy in a preamble confers no authority or power. Preambles "constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows" (*Carter v. Carter Coal Co.*, 298 U.S. 238, 280); they "do not constitute an exertion of the *will* of Congress which is legislation, but a recital of considerations which in the *opinion* of that body existed and justified the expression of its will in the * * * act" (ibid, p. 290). [Italics are the Court's]. A preamble is no part of the statute; it may aid construction of doubtful or ambiguous provisions, but it cannot enlarge or confer powers. *Yazoo & Missis-*

sippi Valley Railroad Co. v. Thomas, 132 U.S. 174; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418; *In re American States Public Service Co.*, 12 F. Supp. 667, 681.

Having declared its policy, Congress in the Merchant Marine Act of 1936 proceeded to specify the administrative functions of the Commission and to prescribe the authority and the responsibilities which it deemed proper to further the policy which it declared. It did not leave to the Commission the manufacture of such powers as the Commission thought would be desirable in furtherance of that policy.

It is patent from the Act that the Commission was an administrative agency with limited and specified powers. In the Act, Congress conferred upon the Commission a variety of specific powers:—the power to construct vessels, to operate vessels, to grant construction differential subsidies and operating differential subsidies, to lend money and to take security therefor, to subordinate ship mortgages, to construct and repair vessels for government agencies, and, among other powers, to make advances and contracts to protect, preserve or improve collateral. These powers, specifically conferred and delimited, demonstrate that Congress never conferred upon the Commission the broad and unlimited grant of authority which petitioners have claimed, *a power which, had it existed, would have rendered all other powers unnecessary.* Section 207 of the Act authorized the Commission to "enter into such contracts, on behalf of the United States * * * as may, in its discretion, be necessary to carry on the *activities* authorized" by the Act. The authority to enter into contracts necessary to carry on the *activities* authorized is not synonymous with authority to achieve the *ends, objectives* or *policy* of the act. The "activities authorized" are such as are elsewhere expressly stated, i. e., Congress has itself decided what activities should be permitted in order to achieve the proper purposes of the Act. The language quoted was in Sec-

tion 207 as originally enacted, and, if it were susceptible of the construction asked by petitioners, it would have been unnecessary in 1938 to enact Sections 202 and 215 and to amend Section 207.

But it is unnecessary to labor the question. The problem in this case is, to use an expression of Mr. Justice Holmes (*Northern Securities Company v. United States*, 193 U.S. 197 at 401), merely "to read English intelligently," to read in clear language Section 207 of the Merchant Marine Act of 1936, as amended. And, as said in *Addison v. Holly Hill Fruit Products, Inc.*; 322 U.S. 607 at 617:

> "To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another."

Moreover, the reason assigned by petitioners in their brief, in this Court, as the basis of authority to acquire outright title does not even fit within their latitudinarian interpretation of Section 207. In footnote 17, page 33, they say that the Commission had "authority to acquire absolute title to the stock" under a construction of the Act as conferring unlimited power to do whatever was necessary "to foster the development and maintenance of a merchant marine sufficient to carry water-borne commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such commerce," because "such acquisition was the only way to avert the bankruptcy of an essential shipping company and to continue it in operation." This tumescent argument collapses at the end. Bankruptcy of Dollar of Delaware was threatened because the Commission was pressing for further security for payment of the debt and was refusing to grant an operating differential subsidy such as was contemplated by the Merchant Marine Act in lieu

of the former ocean mail contracts. By receiving the stock as additional or substituted collateral for payment of the debt, thereby acquiring control of the management during the period of the indebtedness and of any subsidy, the Commission received full protection, and bankruptcy was also averted. It is difficult to follow the reasoning by which it is argued that it was necessary for the Commission to force the owners of the debtor's stock to give up their ownership to the Commission without one cent of credit upon or reduction of the debt in order to prevent bankruptcy. This matter is discussed at further length at pages 49-55, infra. Furthermore, the argument is tantamount to the amazing claim that by the preamble of the Act Congress has conferred upon the Commission the tremendous power to purchase the stock of any steamship company which it fears may go bankrupt.

3. **The Power Cannot Be Found in Any Other Statute or Source.**

In the courts below the petitioners predicated the Commission's power to purchase upon the argument that there are some circumstances in which it may hold title to stock absolutely, citing cases such as *Nielson v. Lagow*, 12 How. 98. This case is one of a series holding that officers of the United States upon whom devolve duties to collect debts or monies owing to the Government have authority without express legislative grant to take property or a bond or other instrument by way of security for payment of the indebtedness. The basis of these decisions is that denial of the power to take security for a debt owing to the United States according to the usual methods provided by law would deprive the Government of a usual and sometimes necessary means of obtaining payment.[10] See *United States v.*

[10] It is upon the authority of cases such as *Nielson v. Lagow* that the Committee of Congress stated in its report on the 1938 amendment to Section 207 of the *Merchant Marine Act* that the power to protect and preserve the collateral held by the Commission is a power "often exercised by other Government lending agencies" (see discussion at p. 30, supra).

Bradley, 10 Pet. 343, and *United States v. Linn*, 15 Pet. 290. In the *Nielson* case this Court pointed out that the authority thus implied is strictly limited to taking security for a debt. It said (p. 108):

> "the object of any form of conveyance by way of security is not to acquire the dominion and ownership of land, nor even to invest funds therein but simply to obtain payment of the debt secured."

In the instant case, it is respondents who assert that the stock was transferred only as security for the debt, which has since been paid. It is the petitioners who assert that the object and effect of the transaction was to transfer the dominion and ownership of the shares to them.

It might well be that to take collateral implies the power to sell on default and to purchase the property at the foreclosure sale in order to protect and realize upon the collateral. But in the present case there was neither default nor attempt to sell on default. Petitioners also argued below that the Commission did not "purchase" the stock in Dollar of Delaware but acquired it in settlement of a debt in the sense that it released the obligations of two of the respondents as co-obligors or sureties. As we later show, (pp. 43 et seq.), this was only a substitution of collateral. It suffices to say at this juncture (1) that, whatever the consideration may be for an outright transfer of title, such a transfer would still be a purchase and sale, and (2) that debts to the United States must be paid in money (Cf. Title 31 *U.S.C.*, Sec. 198). While Congress has authorized compromise and acceptance of something other than money in settlement of claims due the United States, it has conferred the power to make such arrangements only upon the Secretary of the Treasury (Title 31 *U.S.C.*, Sec. 194) or the Attorney General (*Executive Order*, No. 6166). No such power was ever conferred on the Commission. Certainly no such power can

be found in Section 207 of the *Merchant Marine Act* of 1936, as amended, for the acceptance of property in discharge of an indebtedness cannot be denominated an act of protection, preservation or improvement of collateral.

B. Prohibition of Purchase of the Stock.

This case is not only one of *lack* of legislative authority to make the sort of contract which petitioners claim the agreement of August 15, 1938 to be. It is one where the law enjoined the Commission from making such a contract.

The navigation laws of the United States (Title 46 *U.S.C.*, Sec. 11) permit the registry or enrollment only of vessels belonging wholly to citizens, and the *Merchant Marine Act* of 1936 permits operating differential subsidies to be granted only to citizens (Act, Sec. 602 Title 46 *U.S.C.*, Sec. 1171). The term "citizen" is defined in the law (Title 46 *U.S.C.*, Sec. 1244) as including a "corporation * * * only if it is a citizen of the United States within the meaning of Section 802." That section defines a corporate citizen of the United States as one in which the "controlling interest is owned by citizens of the United States" (Title 46 *U.S.C.*, Sec. 802). The Attorney General has advised, in connection with this provision, that a corporation, whose stock is held by the United States, is not a citizen of the United States (33 *Opinions Attorney General* 575, 576). The United States is no more one of its own citizens than it is a "person" entitled to sue for damages under the Sherman Act (*United States v. Cooper Corporation*, 312 U.S. 600). While "it is a juristic person in the sense that it can sue upon its contracts or in vindication of its property rights" (*United States v. Cooper Corporation*) and need not give itself express authority to enable it to enforce in its own courts its contract and property rights (*Dugan v. United States*, 3 Wheat. 172, 181), terms

such as "person" do "not include the sovereign, in common usage, nor, ordinarily, when employed in statutes."

Thus the vessels owned by Dollar of Delaware could not be enrolled or registered if the Commission owned the controlling stock. Nor could the Commission then grant any subsidy to the corporation. This is significant, because petitioners have sought to support their power to purchase the stock on the theory that the Commission had general powers to rehabilitate an essential steamship service; that to this end it was necessary to grant a subsidy to the corporation, and that the very purpose of the contract of 1938 was to "qualify" Dollar of Delaware for a grant of operating differential subsidies that under the law could be given only to citizens of the United States as defined in the Merchant Marine Act. Yet, by the very act of such acquisition, the grant of subsidies would have been in violation of positive provisions of the Merchant Marine Act.

The power which petitioners claim in this case is one which would permit them readily to circumvent and defeat the legislative intent expressed in numerous other statutes. Thus, at the very moment when they are challenging the jurisdiction on the ground of sovereign immunity, they assert that they have a power to purchase and acquire in behalf of the United States a controlling interest in a private corporation, a power the exercise of which indirectly permits suit to be maintained and process to be issued against properties which are those of the government. The *Suits in Admiralty Act* (Title 46 *U.S.C.*, Sec. 741, et seq.) prescribes the precise conditions upon which the United States may be sued upon certain causes of action in admiralty and exempts vessels of the United States from process *in rem*. But the Commission, by acquiring the stock in a steamship corporation, instead of ships, would not only expose the assets and property of the government to processes of admiralty but to the processes of federal courts in other actions and of state courts as well.

Furthermore, although the Commission is charged with the responsibility of operating merchant vessels belonging to the United States, the petitioners' contention, if upheld, would permit the Commission to delegate this responsibility and entrust the administration of public property and public funds to private individuals who are not public officials, all by acquiring for the government the shares of a private stock corporation controlled by a directorate of private individuals. When Congress has seen fit to use corporate instrumentalities, it has been quite able to do so, and has done so, by explicit legislation (see *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381 at 390). It did not authorize the Commission to act through corporations, and that power may not be supplied.

C. An Opinion of the Attorney General Shows Lack of Power in the Commission to Take Outright Title.

This Court has said that where the Attorney General construes an act in a given way and the construction is followed by the executive officers charged with administration of the law, Congress will be held to have adopted that construction in the enactment of a subsequent but similar law. *United States v. G. Falk & Brother*, 204 U.S. 143, 150; *Provost v. United States*, 269 U.S. 443, 458; and cf. *H. Hackfield and Co. v. United States*, 197 U.S. 442, 452.[11]

In 1923 the President asked the Attorney General whether the United States Shipping Board, whose authority was to be found in the *Merchant Marine Act of 1920*, could dispose of vessels by incorporating private corporations under state law and

[11]The rationale is similar to the elementary principle that when a statute has been judicially construed and then is re-enacted in substantially similar terms, the legislature is presumed to be familiar with the construction and to have adopted it as part of the law, unless a different construction is expressly required. Cf. *Blake v. McKim*, 103 U.S. 336, 339; *Sewing Machine Companies Case*, 85 U.S. 553, 584; 50 *Am. Jur.* 312.

transferring ships to them in consideration of the issuance of capital stock to the Board. The Attorney General rendered an opinion that it could not. (33 Opinions 575). Among other reasons, the Attorney General stated:

(1) The statute confined sales of ships to citizens of the United States, and, under Section 38, a corporation of which the controlling interest was owned by the United States was not a citizen because "it is impossible to construe the words 'citizen of the United States' as including the United States." This Section 38 later was carried into Title 46 *U.S.C.*, as Section 802 and is the identical section controlling the meaning of "citizen" as used in the Merchant Marine Act of 1936 (see p. 36, supra).

(2) There was no authority for acquisition by the Shipping Board of stock in a private corporation, the Board could only receive cash for its properties (just as we contend that the Commission could not acquire stock in settlement of a debt), the acquisition of stock in a private corporation would subject government property in a variety of ways to state laws, and the administration of that property would pass out of the hands of public officials into private hands.

(3) The power could not be derived from authority to make necessary rules and regulations to carry out the purposes of the act, and the language of Section 1, announcing the national policy to develop and encourage a merchant marine, added nothing to the Board's powers because a preamble cannot enlarge or confer powers.

The special significance of this opinion is that it was extant at the time of the enactment of the *Merchant Marine Act of 1936* and stated with clarity and on cogent reasoning that under a similar act the government agency created to administer it could not acquire stock in a private steamship corporation. Consequently, had Congress in 1936, or by the amendment of 1938, intended to confer that power, it would have done so explicitly.

It would not have left it to be extracted from preambles and policies by modes of argument which the legal adviser of the Executive Department had theretofore said to be unsound in a similar case.

Doubts Expressed by Other Governmental Agencies

In his *Annual Report to Congress for the Fiscal Year ending June 30, 1940*, the Comptroller General said that the Commission's alleged acquisition of the stock here involved was *"under doubtful authority, to say the least."*

This view of an agency of the government having duties and responsibilities relative to use of government funds by the Commission is entitled to consideration in the interpretation of the act. *Adams v. United States*, 319 U.S. 312, 315; *Bowen v. Johnston*, 306 U.S. 19, 29, 30.

General Counsel for the Maritime Commission himself stated in an opinion to the Commission "that a careful study of the Merchant Marine Act of 1936 does not reveal that the Congress contemplated the type of government operation involved in the proposed transaction," speaking of the instant transaction of 1938.[12] While, despite this observation, General Counsel advised the Commission that it could proceed with the transaction, he did so on reasoning that only supports the transaction as a pledge (see discussion at pp. 47-49; infra).

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[12]His entire opinion appears at pages 94-108, and the quoted statement on page 108, of the Commission's Special Report to Congress of April 10, 1939 entitled "Reorganization of American President Lines, Ltd.," a copy of which is Exhibit A-2 to Affidavit of Emory S. Land; the affidavit appears at R. 21. Pursuant to "Stipulation as to Printing of Record" (R. 172), the copy of the Report is not printed in the record. We contend, of course, that Land's affidavit is no proper part of the record on this appeal and that any alleged factual material therein cannot be considered, but reference to the legal opinion of Commission's General Counsel is of a different character.

D. Conclusion:—As a Consequence of Lack of Power of the Commission to Acquire Title Outright to Shares in Private Corporations, the Contract of August 15, 1938 Cannot Be Given Effect as a Contract of Sale and Purchase.

If the contract of August 15, 1938 were construed as petitioners would construe it, it would be unenforceable. It can be given no effect beyond the permissible limits of an hypothecation. We submit that it could not and therefore did not vest in petitioners any right, title or interest other than as collateral.

IV.

SECOND GROUND ON WHICH THE COMPLAINT STATES A CLAIM FOR RELIEF:—AS A MATTER OF CONSTRUCTION, THE CONTRACT OF AUGUST 15, 1938 WAS A SECURITY TRANSACTION SUBSTITUTING A PLEDGE OF STOCK, WHICH GAVE THE CREDITOR CONTROL OF MANAGEMENT, FOR THE PERSONAL OBLIGATION OF CERTAIN SURETIES.

The complaint alleges that the transaction was a security transaction only. It alleges in paragraphs 29 and 30 (R. 6) that

> *"such transfer was in fact and in legal effect collateral security for the indebtedness of the company to the United States Maritime Commission"*

and that

> *"The indebtedness of the company to the United States for which said shares were transferred as collateral, security,* amounted to approximately $7,500,000 in principal amount, all of said amount having been fully satisfied and accordingly the indebtedness *for which the stock has been transferred as collateral* no longer exists."

These allegations must be accepted as true and as controlling until the case is tried, unless the agreement of August 15, 1938, a copy of which is attached to the complaint as Exhibit A, must

as a matter of law be construed as a contract of sale and purchase, that is, unless the exhibit completely and irrefutably demonstrates as a matter of law that our contention cannot possibly be true.[13] This it does not do, and actually the contract itself sustains the allegation of a pledge.

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[13]In footnote 16 on page 32 of petitioners' brief in this Court, it is asserted that the allegations of the complaint quoted above are "conclusions of law" and, therefore not admitted as true by a motion to dismiss. Even before the adoption of Federal Rules of Civil Procedure, this argument would have been unsound, for the allegations are not conclusions of law but of ultimate fact. If a copy of the contract had not been attached to the complaint, petitioners would not even attempt to claim that an allegation that at a given date plaintiffs pledged to defendants certain property to secure a certain debt was not an allegation of fact, and such an allegation, coupled with allegations that the debt had been paid and that defendants refused to return the property, would clearly have constituted a good complaint. Doubtless an allegation of ultimate fact would succumb if specific facts were also pleaded which conclusively demonstrated that the allegation was erroneous. The matter is therefore precisely as stated above, viz., the quoted allegations of the complaint must be accepted as true unless the copy of the agreement attached as an exhibit completely and irrefutably demonstrates as a matter of law that they cannot possibly be true. The unsoundness of petitioners' argument is even clearer under the present Rules of Civil Procedure. The distinction between "conclusions of law" and "ultimate fact" is such a fruitless and often impossible one that the Rules have swept it aside. Cf. discussion in 1 *Moore Federal Practice*, pp. 546-553. There Moore states (p. 553):

> "And the Federal Rules have avoided one of the sore spots of code pleading. The federal courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence, or law."

The Rules do not even require that "facts" be pleaded. Rule 8(a) prescribes merely that the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." And see cases cited in *Moore's 1945 Cumulative Supplement* at pages 209 to 211, inclusive. We also call attention to the principles of pleading discussed at pages 20-21, supra.

If it is not the case that the transaction here was a mere substitution of collateral, the harsh injustice is worked that the creditor has been paid its debt in full and yet remains the owner of 92% of the voting stock of the debtor which it received only because of the debt, all to the utter deprivation of the former owners. That construction works a forfeiture, and it is elementary that "the construction which avoids forfeiture *must* be made if it is at all possible" (*Ballard v. MacCallum*, 15 Cal 2d 439, 444, 101 Pac. 2d 692), or "unless no other interpretation is reasonably possible." As *Williston* states (3 *Williston on Contracts*, Rev. Ed. pp. 1786; 1787), "An interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh and inequitable results. Therefore, an interpretation of a contract or agreement which would lead to a forfeiture will not be favored."

The transaction, we submit, was a substitution of collateral. The entire debt of Dollar of Delaware was secured by ship mortgages; a part of it was secured in two ways, (1) by the ship mortgages, and (2) by the personal obligation of two of the stockholders, R. Stanley Dollar and Dollar of California as accommodation makers, endorsers and guarantors of ship mortgage notes. The essence of a transaction whereby one becomes an accommodation maker, endorser or guarantor of a note is that he lends his general credit to another (*Uniform Negotiable Instruments Act*, Sec. 29; *California Civil Code*, Sec. 3110). By the contract of August 1938, the personal obligation of the two stockholders was withdrawn, and there was substituted in its place their stock and the stock of the others, thereby giving voting control and control of the management, without necessity of foreclosure, judgments, executions and the like. Since the general credit of two respondents, R. Stanley Dollar and Dollar of California, had been given as security, that which was substituted must be deemed by equity to retain the same character.

A. Any Conveyance, However Absolute It Seems to Be on Its Face, May Be Deemed a Mortgage or a Transfer as Security.

However absolute on its face a conveyance appears, it may still be only a mortgage or a transfer as security. In *Cabrera v. American Colonial Bank*, 214 U.S. 224, the defendant was the joint maker of a note secured by a mortgage, just as here respondents are co-makers on certain notes to the Commission which were secured by mortgages on ships on Dollar of Delaware, the principal debtor. In the *Cabrera* case the co-maker subsequently executed a bill of sale of certain property, the document reciting that it was in payment of the note. The District Court found that the bill of sale was taken merely as "additional security." The appellant argued that the bill of sale necessarily had the effect of being a conveyance in payment of the indebtedness by operation of law. The Court affirmed and said (pp. 230-231):—

> "The face of an instrument is not always conclusive of its purpose. * * * In other words, the real transaction is permitted to be proved. This court said in *Peugh v. Davis*, 96 U.S. 332, 336, and repeated it in *Brick v. Brick*, 98 U.S. 516: 'As the equity upon which the court acts in such cases arises from *the real character of the transaction*, any evidence, written or oral, tending to show this is admissible.' The rule which excludes parol testimony, the court further said, has reference to the language used by the parties and does not forbid an inquiry into their object in executing and receiving the instrument. * * * In *Morgan's Assignees v. Strum*, the rule of equity was enforced against the bill of sale of a vessel, though it was enrolled and also insured in the name of the transferee.

In 4 *Pomeroy's Equity Jurisprudence* (5th Ed.), p. 582, Note 16, it is said that "The rule that a deed absolute in form may, as between the parties, be shown to be a mortgage, is too well settled to require the citation of more than a few authorities,"

many of which are there assembled, and, again (p. 583), that "The doctrine of the text is applied under every variety of circumstances where the essential fact exists."

Consequently, even if the contract of August 15, 1938 stated in express terms that it transferred absolute title—and this it does not do—it would not be inconsistent with a security transaction. Therefore it does not impair the force or the truth of the allegations of the complaint. If the contract is susceptible of either construction, respondents are entitled to a trial in order to have the opportunity of proving the allegation that the contract was in fact a pledge.

B. The Contract of August 15, 1938 in Fact Does Not Purport to Be a Sale, but on Its Face It Is More Consistent With Being a Security Transaction Than a Sale.

No part of the contract of August 15, 1938 states that the transfer of title is absolute, purports to be an outright transfer independent of the debt, or denies that it was by way of security. On the other hand there are portions of that agreement which are consistent only with a pledge. We enumerate:—

1. Provisions With Respect to Right of Transferee to Sell.

Paragraph 23(d) (R. 17) of the contract provides that the Commission shall not have "any duty or obligation to continue to hold any of the stock, or any interest in or to any of the stock, of Dollar of Delaware which it may acquire under the terms and provisions hereof or otherwise." It is settled law (3 *Williston on Contracts*, Rev. Ed., Sec. 619, p. 1781) that

> "The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable * * *."

Professor Williston's statement is quoted with approval in *E. I. du Pont de Nemours & Co. v. Claiborne-Reno Company*, 64 F. 2d 224 (8 Cir.). It is also the law of California. *California Civil Code*, Sec. 1641.[14]

Patently, if the transaction was a sale, the Commission could do what it pleased with the stock so far as any of the other parties to the agreement were concerned, without the necessity of any such provision as that portion of paragraph 23(d) quoted above, and that provision was wholly unnecessary and useless, or is inexplicable.

But if, in fact, the transfer was a substitution of collateral, the clause becomes meaningful:—the pledgee is given the power to sell at any time, but necessarily the proceeds would have to be applied on the debt.[15]

The Court of Appeals in its opinion considered this provision of the contract to be significant, for it said (154 F. 2d 307, 309, 310):—

> "As appellants argue, the terms of the contract seem in some respects to be more consonant with the theory of pledge than that of outright transfer. For example, it was specifically provided that appellees should acquire some 90% of the voting control of the company and have the power to sell the securities acquired. Neither of these conditions would appear necessary if the transfer was intended to be absolute."

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[14] "Effect to be given to every part of contract. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

[15] "Going outside the record, petitioners pointed in the court below to a public offer of sale of the stock made by the Commission in July 1943, and argued that respondents' failure to object somehow created an estoppel. But paragraph 23(d) gave the pledgee power to sell, a power lapsing when the debt was paid subsequent to July 1943. The next time a public offer to sell was made, in 1945, respondents made inquiry whether the debt was paid and, learning that it had been, demanded their stock and upon refusal promptly sued."

2. The Commission's Dominant Purpose Is Revealed as Being to Control the Management to Protect the Debt. That Being the Only Proper Purpose.

The foregoing quotation from the opinion of the Court of Appeals calls attention to another indicium of a security transaction on the face of the contract:—

Paragraphs 3, 4 and 5 of the contract (R. 10, 11) relate to the transfer to the Commission of certain stock subject to a superior pledge and take pains to state that the Commission was to have the voting rights. This fact emphasizes that what the Commission wanted was voting control so that it might control the management of the debtor. Obviously it desired to control the management in order to protect the obligation owing to it and the security of the mortgaged ships. Once the debt was paid, the Commission could have no need for voting control.

To assume that the Commission wanted more and was using its superior position to coerce and extract more is to assign to it motives of greed. The law is reluctant to assign such motives to public officials and prefers to believe that public officials act fairly (*Reynolds v. United States*, 70 F. 2d 39, 41 (7 Cir.)), in good faith and honorably (concurring opinion of Douglas, J. in *Hirabayashi v. United States*, 320 U.S. 81, 106), that they do not use the powers conferred on them arbitrarily (*Douglas v. Noble*, 261 U.S. 165, 170), just as it prefers to believe that they will act in accordance with their legal authority (*Barry v. United States*, 279 U.S. 597, 614; *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 190). Where public officials choose to stultify themselves by taking a position denying all these presumptions of law, the burden on them is indeed heavy.

The fact that the Commission's chief concern was to control the management is demonstrated by paragraphs 7 to 10, inclusive, of the agreement. Dollar of Delaware was being managed by the Robert Dollar Company under a management contract

which had been executed between Dollar of California and The Robert Dollar Company and assigned to Dollar of Delaware. By paragraph 7 (R. 11, 12) this agreement was to be cancelled.

The dominating motive was to control the management, not to acquire title, and it is elementary that contracts are to be construed in the light of the main purpose or object. 3 *Williston on Contracts*, Rev. ed., Sec. 619, p. 1782; *Marx v. American Malting Co.*, 169 Fed. 582, 584 (6 Cir.).

The only legitimate purpose the Commission could have had was to protect the government's investment. But common sense at once tells us that the objective was equally attainable by acquisition of the stock as collateral, which would empower the Commission to control the corporation and its management until the debt was paid. The only difference between acquisition of the stock independent of the debt and acquisition of the stock as collateral is that in the former case the Commission might sell the stock, and thus acquire a windfall, despite payment of the debt. *But this difference is one having no relation to the legitimate objectives of the Commission.*

By certain arguments made in their brief in the Court of Appeals, petitioners have conceded the case on the point now under discussion.[16] They there conceded (p. 39):—

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[16] The Court of Appeals in its opinion (154 F.2d 307 at 310) made a statement (based on matter called to its attention by petitioners, although outside the proper record) which is relevant to the arguments of petitioners referred to above. It said:

> "Further, some of the language used in the Commission's press release of July 6, 1943, tends to illustrate the genuineness of the claim which appellants are asserting. In announcing that it was considering the possibility of bringing about private ownership of the American President Lines the Commission's release said: 'Some of the debts of the Company were covered by debentures and preferred stock, and the Maritime Commission, *to protect its interests* and insure continuation of service, *came into possession* of 80 per cent of the common stock. Although the Commission had full vot-

"Admittedly the Commission desired voting control of Dollar of Delaware; by controlling its management, it might salvage an essential unit in our maritime trade. Concededly, such control might have been secured under a pledge arrangement.

Again they said (p. 26):—

"The transfer of the stock to the Commission gave the Commission control of Dollar of Delaware. With control of the corporation in the Commission, its position as a mortgage creditor was obviously improved and protected. At the very least, the Commission was certainly free to conclude that the control of the company was better security for its creditor position than were the co-obligations of appellants on the company's liability to the Commission."

Could a better description be given of a transaction substituting one kind of collateral for another? Stock, carrying with it voting control, was substituted for the obligation of personal sureties, to secure the debt.

3. Express Provision That the Transfer of the Stock Would Not Reduce the Indebtedness of Dollar of Delaware to Any Extent Whatever.

The surest proof and test that a conveyance or transfer of property is only by way of security, regardless of form, is the continuance of the debt. Most courts consider that circumstance

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ing control, it caused the Company to be operated by a Board of Directors which included representative local interests of San Francisco and former creditors of the concern." (Italics added.) It would thus appear that perhaps the possession acquired by the Commission to protect its 'interests' was, as appellants urge, nothing more than a bargain by which there was a substitution of collateral resulting in strengthening the Commission's position by reason of the management control inextricably bound to the transferred stock. We have no finding or conclusion from the trial court on this basic issue which we believe must be tried." (Italics are the court's)

to be conclusive. 4 *Pomeroy's Equity Jurisprudence,* 5th Ed., states at pages 576, 577:

> "A general criterion, however, has been established by an overwhelming consensus of authorities, which furnishes a sufficient test in the great majority of cases; and whenever the application of this test still leaves a *doubt,* the American courts, from obvious motives of policy, have generally leaned in favor of the mortgage. This criterion is the continued existence of a debt or liability between the parties so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, * * * then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments." (Italics are the author's)

In *Hickox v. Lowe,* 10 Cal. 197 at 206, Mr. Justice Stephen J. Field (later a member of this Court) laid down the same rule:— "the solution of the question * * * depends upon the fact whether this debt was discharged by the conveyance or subsisted afterwards * * * Where there is doubt [whether the debt subsists], Courts of Equity lean in favor of the right of redemption * * *." In *MacNamara v. Culver,* 22 Kan. 661, Mr. Justice Brewer, also later a member of this Court, announced the same rule. *Dickens v. Heston,* 53 Idaho 91, 21 Pac. 2d 905, states that that is the "test." The preponderance of decided cases follows the view that the *continuance of a debtor-creditor relationship* after an instrument of transfer takes effect is the *"decisive test"* that the transaction is a mortgage, or "indelibly stamps" it as such.[17] The *conclusiveness* of the fact is

[17] *Bickel v. Wessinger,* 58 Ore. 28, 113 P. 34, 38; *Fairpow v. Work,* 39 Okla. 734, 136 P. 739; *O'Neill v. Capelle,* 62 Mo. 202; L.R.A. 1916B, 362.

affirmed in numerous other cases,[18] and all courts treat the fact of a continuing obligation as of great and impelling force, the "central fact."[19] "It is manifest that, where no part of the debt is discharged at the time of the conveyance or release, the change in the relationship of the parties is one in name only and not in substance." *Lynch v. Ryan*, 132 Wis. 271, 111 N.W. 707.

What, then, was the situation here? The $7,500,000 debt of the principal debtor, Dollar of Delaware, remained wholly unaffected. The agreement of August 15, 1938 expressly provided that the debt should remain unaltered. Two of the stockholders who transferred their stock to the Commission, R. Stanley Dollar, and Dollar of California, were indebted to the Commission as "makers, co-makers, guarantors or endorsers" of the ship mortgage notes given by Dollar of Delaware (Contract, para. 14, R. 13) and were released on transfer of their stock. But paragraph 14 of the contract (R. 13, 14) prescribes that the release of the co-makers, sureties or endorsers

> "shall not release or in any way impair its [Dollar of Delaware's] obligations under said notes or said mortgages securing the same, nor shall any credits be allowed or given thereon, either as to principal or interest, by reason of the stock transfers or other consideration that may be received by the Commission under the terms and provisions hereof."

The status of R. Stanley Dollar and Dollar of California, prior to the August 1938 contract, by reason of their obligation

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[18] *Montgomery v. Spect*, 55 Cal. 352, 357; *Conant v. Riseborough*, 139 Ill. 383, 28 N.E. 789, 791; *Marshall v. Thompson*, 3 Minn. 137, 39 N.W. 309; *Chance v. Jennings*, 159 Mo. 544, 61 S.W. 177, 180; *Judge v. Reese*, 24 N.J.Eq. 387, 397; *LeComte v. Pennock*, 61 Kan. 330, 59 P. 641.

[19] *Campbell v. Dearborn*, 109 Mass. 130, 143; *Smith v. Becker*, 184 S.W. 943, 192 Mo. App. 597; *Rockwell v. Humphrey*, 57 Wis. 410, 15 N.W. 394.

as "makers, co-makers, guarantors or endorsers" on the ship mortgage notes of Dollar of Delaware, is clear enough. They were jointly liable with Dollar of Delaware on those notes. As between them and Dollar of Delaware they were sureties, but as regards the Commission they were joint obligors. *Uniform Negotiable Instruments Act*, Sec. 29; *California Civil Code*, Sec. 3110 (identical with N.I.A., Sec. 29).[20] The liability was a joint one, not only where these two respondents were co-makers but also where they were accommodation endorsers or guarantors (*Ruby v. West Coast Lumber Co.*, 139 Ore. 388, 10 Pac. 2d 358; *Continental Bank & Trust Co. v. Bouterie*, (La.) 169 So. 812).

Upon principles recognized by the best authorities, *if the transfer of the stock and the release of R. Stanley Dollar and Dollar of California was an outright sale in consideration of the release rather than a mere substitution of one form of collateral for another, then the fair value of the stock should have been applied on the debt of Dollar of Delaware. But the very contrary was expressly provided in the agreement. A fortiori*, the transfer was a substitution of collateral.

It has long been the law, not only that a release of one joint debtor releases the others and that if one joint debtor is released on a transfer of property its value must be applied to reduce the debt of the others, *but also that this rule applies to debts due the United States.* In *United States v. Thompson*, Fed. Cas. No. 16,487 (D.C., E.D. Penn., 1836), custom-house bonds were given to the United States by two joint obligors and judgments subsequently were rendered on them in favor of the United States. Later, one obligor was released by the Secretary of the Treasury upon certain payments and conveyance of tracts of land, under an Act for the relief of insolvent debtors. It was

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[20] And see authorities collected under Section 29 at pages 409, et seq. of 5 *Uniform Laws Annotated*.

held that the other debtor was entitled to have the cash and the value of the realty credited on his obligation, and, had not separate judgments previously been entered, would have been completely released. It was further held that the same law applies when the United States is the creditor as when the creditor is a private party.

The *Restatement of the Law of Contracts*, Section 120, sums up the law on the subject—If one of two or more obligors pays in whole or in part, in the manner provided in his contract, the payment redounds to the credit of all the other obligors, whether the liability is joint, joint and several, or merely several; *and no agreement to the contrary will be given effect.* If, instead of performing in the manner provided in the contract, one obligor either fully or partially satisfies the obligation (as by transferring property in whole or partial satisfaction of an obligation to pay money), again the right of the creditor to proceed against the other obligors is reduced by the value of what was transferred, and if the obligation is joint, or joint and several, *no agreement to the contrary is effective.* Such an agreement may be regarded if the liability was merely several, but even then the law will avoid the result if in any way possible.[21]

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[21] Thus in the Comment on Subsection (2), it is said:

"c. *The idea of unity in a joint duty involves the consequence that performance, payment, or accord and satisfaction of the duty of one promisor destroys the duty of all. Similarly partial satisfaction of the duty of one joint promisor satisfies to the same extent the duty of all.*"

And speaking of an agreement that the payment by one shall not reduce the obligation of the others, it is further commented:

"* * * *even such an agreement cannot have this effect if all or part of what was originally promised is given; and* * * * *even where substituted performance is accepted as full or partial satisfaction, all joint or joint and several promisors are discharged to the same extent that any one of them is.*"

The California law is even more specific (see *California Annotations* to Section 120 of the *Restatement*). As the contract was actually made in California, the California law governs. Section 1477 of the *California Civil Code* provides:—

> "A partial performance of an indivisible obligation extinguishes a corresponding portion thereof, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise."

Williston on Contracts (Rev. Ed., Sec. 341, pp. 1008-1011) discusses the subject and clearly favors the view of a *pro tanto* discharge of all debtors even though there be an express agreement to the contrary. He says (p. 1010):—

> "An agreement between the promisee and the released promisor that such payment or performance shall be simply additional and special consideration for the latter's discharge is deemed inoperative under the Restatement if all or part of what was originally promised is given; and even a different consideration, if accepted in full or partial satisfaction of the duty of one, inures, in spite of such an agreement, to the *pro tanto* discharge of other joint or joint and several co-obligors, as contrasted with those merely severally liable."

He adds (p. 1011):—

> "Payments so made are now applied in reduction of the debt and in discharge of the other promisors or obligors by statute in a number of jurisdictions."

And in this connection he cites Section 1474 of the *California Civil Code* as well as Section 3 of the *Uniform Joint Obligations Act*. The *California Civil Code*, Sec. 1474, provides:—

Again, that while, in a case where the obligations are merely several, a settlement may be made with one without diminishing the creditor's claims against the other, nevertheless

> *"Though this is legally possible, an inference should not be drawn that the duty of one promisor only is to be affected, unless circumstances clearly require that conclusion."*

"Performance of an obligation, by one of several persons who are jointly liable under it, extinguishes the liability of all."[22]

4. Lack of Any Adequate Consideration to the Other Stockholders for an Outright Transfer of Their Stock.

Not only is the true character of the transaction as a pledge of stock demonstrated by consideration of the situation from the standpoint of R. Stanley Dollar and Dollar of California, but the same conclusion follows from consideration of the matter from the standpoint of the other respondents.

They had not been indebted to the Commission at all. Patently they received no consideration for the transfer of their stock if an absolute title passed. It is understandable why as stockholders of Dollar of Delaware they would be willing to pledge their stock to secure the debt of their corporation in order to give the debtor time to work out its situation, for it might be able to pay off the debt and thereby the stockholders would protect their investment. But to assume that they were willing to transfer their stock outright, receiving no consideration therefor and without any reduction of the debt of their corporation, is to assume a transaction so contrary to common sense that, if at all possible, the agreement will not be so construed. Cf. *Steir v. Archibald*, 151 Cal. 220, 90 Pac. 536.

The first paragraph of the agreement of August 15, 1938 following the recitals (i.e., the paragraph immediately preceding paragraph No. 1 of the "Adjustment Plan—Dollar Steamship Lines, Inc. Ltd.") recites (R. 9):—

"The parties hereto are interested, directly and indirectly, financially and otherwise, in Dollar of Delaware, and deem

[22]This section was adopted in 1872 and was borrowed from Section 700 of the *New York Civil Code*. And cf. *Yule v. Bishop*, 133 Cal. 574, 65 Pac. 1094. *California Civil Code Section* 1477, quoted above, was adopted in 1872 and was borrowed from Section 703 of the *New York Civil Code*.

"the consummation of the Adjustment Plan respecting said company as hereinafter set forth to be mutually advantageous."

The plan could hardly have been advantageous to those who were giving up their stock absolutely, but clearly it would be advantageous if they were transferring their stock merely as security.

One of the important tests implied by the courts in determining whether a transfer otherwise absolute in form was by way of security is the adequacy of consideration. The question is not whether some technical consideration, sufficient under the law of contracts, may be found—technical detriment to the transferee without any benefit to the transferor might be that—but whether in the eyes of sense and justice adequate compensation for an outright transfer is shown. (*Peugh v. Davis*, 96 U.S. 332; *Russell v. Southard*, 12 How. 139; *Conway v. Alexander*, 7 Cranch. 218; *Morris v. Nixon*, 1 How. 118).

In *Villa v. Rodriguez*, 12 Wall. 323, a leading case, a parcel of land was owned jointly by a widow and seven children. The widow and several of the children had given a note and mortgage of their interest to Rodriguez. Later the widow and all the children deeded the property to Rodriguez, who claimed the property was conveyed to him in payment of the debt. The court held that it was still "only security for the debt. This explains the transaction as to those who were not parties to the note and mortgage. There is no other way of accounting for their conduct." (p. 341). "The consideration of the conveyance by the four children not parties to the note and mortgage was such that if an absolute title passed, their deeds must be regarded as deeds of gift of their shares of a valuable estate". (p. 340).

C. Facts and Circumstances Outside the Face of the Contract but Revealed by the Complaint Demonstrate That the Contract Worked No More Than a Pledge as Substitution of Collateral and Support the Allegations of the Complaint to That Effect, Under Settled Principles of Equity and Law.

We have thus seen that the contract on its face supports the allegation of the complaint that the stock was only pledged. Moreover, since evidence outside the instrument is always admissible to determine whether a transaction is an absolute transfer or a mortgage, pledge, or other security transaction (see pp. 44-45, supra, and pp. 59-70, infra), we may note that extrinsic circumstances revealed by the complaint and the applicable legal and equitable principles demonstrate that the 1938 transaction was a mere substitution of collateral and that the defense on the merits is hollow and, indeed, censurable.

1. Summary Statement of Controlling Principles and of the Facts.

(a) Equity jealously protects the debtor and looks to the essential nature of the transaction irrespective of expressed or even conscious intention.

(b) When courts speak of the *real intention* or *real transaction* of the parties, they do not limit themselves to any conscious or verbally expressed state of mind—they do not even care what the parties may have believed was the legal consequence of the transfer—but they allude to the essential nature of the transaction in the light of principles of equity.

(c) Equity will not permit the equity of redemption to be destroyed or "clogged," or relinquished or conveyed to the creditor.

(d) The surest proof and test that a conveyance is still by way of security is that the debt continues to remain.

(e) Where once a debtor-creditor relationship exists, i.e., when the relationship of parties to each other begins as a debtor-creditor relationship, equity will presume that it so continues, subject only to the strongest possible countervailing proof.

(f) Where negotiations between a debtor and creditor begin in demands for, or as discussions concerning, giving of security or better security than already possessed, and end in a transfer of property, the strong presumption is that the transaction concluded just as the negotiations began—as a security transaction.

(g) Where the creditor is in a position of strength and the debtor in a position of weakness, equity is particularly insistent that the original character of the relationship of the parties be not converted into a deprivation and forfeiture of the debtor's title.

(h) Where, too, the creditor's representatives deliberately, consciously and avowedly sought to take advantage of the debtor's necessities, no doubt that the transaction is in essence a security transaction is permissible.

(i) Equity will not construe a transaction between debtor and creditor in such a way that the creditor not only is paid the debt but in addition ends up as the owner of the debtor's property.

The application to this case of the foregoing principles is plain. The relation between Dollar of Delaware and its stockholders, the respondents, on the one hand, and the Maritime Commission, on the other, clearly started as a debtor-creditor relation. The principal debtor was Dollar of Delaware. Its debt to the Commission was secured by two different types of security, including the personal obligation of two of its stockholders as sureties.

The Maritime Commission began to impose pressure of hydraulic immensity upon the debtor and the sureties, and it forced the debtor and the sureties "to yield to the exertion of its power" (cf. language of Professor Pomeroy, quoted at p. 61, infra). We need only refer to the allegations of paragraphs 12 to 23 of the complaint, as well as paragraphs 26 and 27. Driven by the threat of bankruptcy of the principal

debtor and the harassment of the two sureties, the respondents were compelled to deliver their stock to the Maritime Commission. In exchange two of them received back their personal obligation. The other respondents had given no personal obligation and yet transferred their stock as well, receiving nothing at all. The debt has since been paid and if the transfer is treated as a purchase and sale, the creditor has been paid in full in cash and yet remains the owner of 92% of the capital stock of the debtor which it received only because of the debt.

A large body of evidence supporting the complaint will be introduced at the trial, some of it being admissions by petitioners and their predecessors as we show by a summary attached to this brief as an Appendix; the nature of that appendix is explained at page 116, below.

2. Discussion of the Authorities Supporting the Foregoing Principles.

The principle that evidence dehors the instrument is always admissible in determining whether a transfer is absolute or by way of security (*Cabrera v. American Colonial Bank*, 214 U.S. 224; *Russell v. Southard*, 12 How. 139) has nothing to do with rules respecting admission of parol evidence to determine the parties' intention in construing an instrument, on the basis of ambiguity, mistake, or the like. It rests on a different basis. (*Pierce v. Robinson*, 13 Cal. 116, approved in *Peugh v. Davis*, 96 U.S. 332 and *Brick v. Brick*, 98 U.S. 514). The courts go behind what the parties may believe they have accomplished to the essential nature of the transaction.

Thus Professor Williston (3 *Williston on Contracts*, Rev. Ed., Sec. 771, pp. 2171, et seq.) points out that originally mortgages were absolute conveyances and intended by the parties to be such, but that nevertheless equity insisted on creating and pro-

tecting an equity of redemption. Equity originally, and later courts of law, "defied the literal meaning of a mortgage."

> "*These results have not been reached by searching for the intention of parties either actual or expressed.* * * * when courts of equity first established their doctrines in regard to the matter, the expressed intention was doubtless the real intention, yet the intention was disregarded. * * * The maxim, 'Once a mortgage, always a mortgage,' will be applied and redemption allowed. The same principle has been followed in mortgages *and pledges of personal property.* The mortgagor may indeed sell his equity of redemption to the mortgagee, *but in considering the validity of such a sale 'principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question.'* Even though a conveyance made as security for a debt is in terms absolute, and there is no written agreement for a reconveyance or for revesting of title in the grantor, equity will allow redemption of the property if the transaction is clearly proved to be a mortgage."

Pomeroy states (4 *Pomeroy's Equity Jurisprudence,* Sec. 1193, p. 568):—

> "In general, all persons able to contract are permitted to determine and control their own legal relations by any agreements which are not illegal, or opposed to good morals or to public policy; but the mortgage forms a marked exception to this principle. The doctrine has been firmly established from an early day that *when the character of a mortgage has attached at the commencement of the transaction, so that the instrument, whatever be its form, is regarded in equity as a mortgage, that character of mortgage must and will always continue. If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging* to a mortgage in equity.

And on p. 570 Pomeroy states:—

> "*This doctrine* is based upon the relative situation of the debtor and the creditor; it *recognizes the fact that the creditor necessarily has a power over his debtor which may be exercised inequitably; that the debtor is liable to yield to the exertion of such power; and that it protects the debtor absolutely from the consequences of his inferiority, and of his own acts done through infirmity of will.* The doctrine is universal in its application, and underlies many special rules of equity."

In a footnote on page 568 Pomeroy states:—

> "*A court of equity will look beyond the external form, at the real relations between the parties, and will protect the debtor's equity of redemption, if necessary in opposition to the literal terms of the instrument. This principle lies at the base of the entire equitable doctrine,* and is applied to mortgages in the ordinary form, to deeds with a separate defeasance, to deeds absolute on their face, to deeds with accompanying agreements to reconvey, and to every other form of assurance which is in reality a security."

In *Russell v. Southard*, supra, this Court held that a conveyance absolute in form was a mortgage although (p. 156) the grantor "believed his right to redeem was probably extinguished."

> "It is true Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. 'Necessitous men,' says the Lord Chancellor, in *Vernon v. Bethell*, 2 Eden, 113, 'are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them.'" [p. 152]

In the oft-cited case of *Villa v. Rodriguez*, 12 Wall. 323, this Court said (at p. 339): "That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence." This Court also said, in *Russell v. Southard*, supra:

> "In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. * * * But it is not to be forgotten, that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale. *Conway v.* Alexander, 7 Cranch. 218; * * *" (p. 451).

In both *Peugh v. Davis*, 96 U.S. 332 and *Brick v. Brick*, 98 U.S. 514, Mr. Justice Field, delivering the opinion of the court, cited the opinion rendered by him in *Pierce v. Robinson*, 13 Cal. 116, when he was a Justice of the Supreme Court of California. In the latter case he expounded the governing principles of equity at length and with great lucidity. Said he (pp. 125-127):—

> "The entire doctrine of equity, in respect to mortgages, has its origin in considerations independent of the terms in which the instruments are drawn * * *.
>
> "*As the equity upon which the Courts act arises from the real character of the transaction*, it is of no consequence in what manner this character is established, whether by deed or other writing, or by parol. Whether the instrument, * * * is to be regarded as a mortgage, depends upon the circumstances under which it was made, and the relations subsisting between the parties. Evidence of these circumstances and relations is admitted, not for the purpose of contradicting or varying the deed, *but to establish an equity superior to its terms.* * * * *it is the settled policy of equity, admitting of no departure, never to permit a security to be*

converted by any contemporaneous agreement into a sale. * * * Unless parol evidence can be admitted, the policy of the law will be constantly evaded. Debtors, under the force of pressing necessities, will submit to almost any exactions for loans of trifling amount, compared with the value of the property, and the equity of redemption will elude the grasp of the Court, and rest in the simple good faith of the creditor. A mortgage * * *, is, in form, a conveyance of a conditional estate, and the assertion of a right to redeem from a forfeiture, involves the same departure from the terms of the instrument, as in the case of an absolute conveyance executed as security. * * * *The equity arises and is asserted, in both cases, upon exactly the same principles, and is enforced without reference to the agreement of the parties, but from the nature of the transaction to which the right attaches, from the policy of the law, as an inseparable incident.*

In *Hodgkins v. Wright*, 127 Cal. 688, 60 Pac. 431, a judgment that a deed absolute in form was not a mortgage was reversed despite the special verdict of an advisory jury finding that the parties did not intend the deed to be a mortgage or security for the indebtedness. The court said (p. 690):—

> "If in fact and in law the instrument is a mortgage, it does not matter that the parties intend and stipulate that it shall be something else, and that, in case of a failure to pay, the title of the mortgagee shall be absolute."

We have already seen (at pp. 49 to 51, supra) that the circumstance that the debt continues after the transfer is either conclusive that the conveyance was as security only, or of overwhelming effect. In *Sutphen v. Cushman*, 35 Ill. 186, 197, the court said:—

> "It is sufficient for us to know that when he took the conveyance on account of a pre-existing indebtedness, without in any manner canceling or discharging it, that equity will regard the deed as a mortgage, whether he so regarded it or not."

An almost identical statement appears in *Le Comte v. Pennock*, 61 Kan. 330, 59 Pac. 641, 643, and in *Lynch v. Ryan*, 132 Wis. 271, 111 N.W. 707, the court said that:

> "It is manifest that, where no part of the debt is discharged at the time of the conveyance or release, the change in the relationship of the parties is one in name only, and not in substance" (111 N.W. at 708).

The fact that the relationship of the parties has started as debtor and creditor or lienor and lienee, or the like, is of tremendous import. The courts watch transactions between mortgagor and mortgagee or between debtor and creditor with solicitude; they jealously give close scrutiny to any alleged outright transfer, and if the matter is in any way in doubt resolve it in favor of a transfer as security. *Peugh v. Davis*, 96 U.S. 332; *Lewis v. Wells*, 85 Fed. 896; *Cassem v. Heustis*, 201 Ill. 208, 66 N.E. 283;[23] *O'Neill v. Capelle*, 62 Mo. 202; *Lynch v. Ryan*, 132 Wis. 271, 111 N.W. 707; 2 *Story on Equity Jurisprudence*, Sec. 1018b and 1019. The fact that the relationship was originally that of debtor and creditor, lienor and lienee, creates a presumption that the character of the relationship has not changed and that transfers to the creditor by the debtor, no matter what the form, are still by way of security only. In a case where there was no pre-existing indebtedness, but a deed is given upon a new passage of money, and the question is whether the money was a loan or payment of purchase price, the burden of proof may be on him who asserts that the deed absolute on

[23] In *Cassem v. Heustis*, supra, the court said (p. 286):

> "A court of equity will never allow the mortgagee to avail himself of his position to obtain an advantage over the mortgagor by securing such an agreement for the vesting of the entire estate in himself. Contracts between the mortgagor and mortgagee for the purchase or extinguishment of the equity of redemption are always regarded with jealousy by courts of equity."

its face is a mortgage. But where the debtor-creditor relationship already exists, where no new money passes, but there is a purported transfer of the debtor's interest in property, the burden lies on him who asserts that the transaction was absolute and not by way of security only, because he is in the position of a trustee seeking an advantage over his beneficiary. In *Simpson v. First National Bank,* 93 Fed. 309 (8 Cir.), the court said (p. 311):—

> "* * * where the relation of debtor and creditor, or of mortgagor and mortgagee exists, and conveyances are made, or property is delivered by the debtor to the creditor, the legal presumption is that the relation continues, and that the transfers were made as further security for the debt."

In *Villa v. Rodriguez,* 12 Wall. (U.S.) 323, this Court stated that in cases where the mortgagee claims that a conveyance has been made to him, "principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question." In *Clarke v. Fast,* 128 Cal. 422, 61 Pac. 72, the court, citing *Peugh v. Davis,* supra, and *Villa v. Rodriguez,* supra said (p. 74):—

> "It appearing from the answer that defendant's interest in the [insurance] policy was, in its inception, that of a mortgagee, the burden rested upon him to show that the subsequent transaction, by which he claims to have become the owner of it, was fair, that no advantage was taken of Clarke's necessities, and that the consideration paid was adequate."

So also *Marshall v. Thompson,* 39 Minn. 187, 39 N.W. 309; *Lynch v. Ryan,* 132 Wis. 271, 111 N.W. 707; *Sutphen v. Cushman,* 35 Ill. 186 at 197.

Where the transaction claimed to be an outright transfer had its inception in an application for a loan, or in negotiations for security, or for more or better security, the transaction which emerges will ordinarily be regarded as of the same character and a claim that there was change to an outright transfer some-

where along the line requires clearest proof. *Jones on Mortgages* (8th ed.), Sec. 317, pp. 394, 395; *Smith v. Doyle*, 46 Ill. 451; *Smith v. Becker*, 192 Mo. App. 597, 184 S.W. 943; *Chance v. Jennings*, 159 Mo. 544, 61 S.W. 177, 181).

Thus, in *Morris v. Nixon*, 1 How. 118, this Court emphasized the fact that (p. 126)[24]

> "The transaction was begun by Morris, with the request of a loan from Nixon, for which he offered a security upon the property, for the management of which, Nixon was his agent. It ended by Morris giving to Nixon a deed for the property, absolute on its face, and also a bond for a loan of $5,000. Unless, then, some proof has been given to show that they *truly* bargained upon another footing, * * * equity will interpret it to be a security for money loaned"

So also *Dickens v. Heston*, 53 Idaho 91, 21 Pac. 2d 905, 909, and *Murray v. Butte-Monitor Tunnel Mining Co.*, 41 Mont. 449, 110 Pac. 497.

In *Marshall v. Thompson*, 39 Minn. 137, 39 N.W. 309, a purported transfer was held to be "a mere substitution of new securities made for the same debt" (39 N.W. at 310).

> "The plaintiff's rights must be determined by the character of the original transaction * * *. Though a mortgagee may purchase the equity of redemption, yet where the relation of mortgagor and mortgagee is once established, the courts scrutinize with great jealousy the acquisition of the equity of redemption by the mortgagee in any other way than by regular foreclosure. *Niggeler v. Maurin*, 34 Minn. 122, 123, 24 N.W. Rep. 369. Any additional conveyances exacted or secured by the mortgagee for his benefit cannot be used to prevent a redemption. They proceed from the same old root, and are subject to the same equity; otherwise hardship and oppression might be practiced upon the

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[24]In *Morris v. Nixon*, when Morris applied for a loan, Nixon clearly declined, and the deed absolute recited that Nixon always wanted to buy the property. Fourteen years later Morris sued to establish the deed as a mortgage. A judgment for the defendant was reversed.

mortgagor.' *Holridge v. Gillespie*, 2 Johns. Ch. 33. The rule is inflexible, 'once a mortgage, always a mortgage.' Nor is it material that the note or personal obligation evidencing the debt is surrendered or canceled, the debt remaining in fact unpaid."

The necessitous condition of the debtor and the overwhelming strength of the creditor almost conclusively establish that an apparent relinquishment of the equity of redemption or apparent transfer of property outright cannot be permitted to operate as such. *Russell v. Southard*, supra, at pp. 153, 154; *Peugh v. Davis*, supra. In the leading case of *Villa v. Rodriguez*, 12 Wall. (U.S.) 323, this Court stated at length the importance of the fact of the unequal bargaining powers of a mortgagee and mortgagor in financial need.

In *Montgomery v. Spect*, 55 Cal. 352, 354, the court said:—

"'But,' as Mr. Justice Gaston says, in *McDonald v. McLeod*, 1 Ired. Eq. 227, 'in examining transactions between borrowers and lenders, and between necessitous men and their creditors, courts of equity, aware of the unequal relation of the parties, and of the facility by which the former may be surprised into improvident arrangements, and of the moral coercion which the latter can exercise over their apparent freedom of action, are particularly attentive to any circumstances tending to show an inconsistency between the form of an act and the intent of the parties, and will take great pains to get at the substance of what was done or intended to be done by them'."

To the same effect, see also *Conway v. Alexander*, 7 Cranch (U.S.) 218; *Morris v. Nixon*, 1 How. 118, 129, 130; *Murray v. Butte-Monitor Tunnel Mining Co.*, supra,[25] *Dickens v. Heston*, supra.

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[25] "If the grantor in a deed absolute in form, but alleged to have been intended as a security, was financially embarrassed at the time of its execution, being sorely pressed for money, and therefore at the mercy of his creditor and unable freely to dictate the terms of the security, this circumstance will be considered as tending to show the intention to create a mortgage." (pp. 499-500)

The fact that a debtor was financially embarrassed at the time of the transfer has been considered important in numerous other cases.[26] In *Lynch v. Ryan*, 132 Wis. 271, 111 N.W. 707, a judgment holding a transfer to be absolute was reversed. The court said (111 N.W. at 708):—

> "Where the relation of mortgagor and mortgagee of real estate has been once established between two parties, and it is claimed that by a subsequent deed of the premises by the mortgagor to the mortgagee the equity of redemption has been extinguished and the mortgagee has become the absolute owner of the premises, it must be clearly shown that the conveyance or release was voluntary on the part of the mortgagor, was based on an adequate consideration, was untainted by fraud, and that no advantage was taken of the debtor's necessities to drive a hard bargain. Such transactions will be closely scrutinized, and, if the proof be clear and satisfactory that the requirements above named have been observed, the transaction will be sustained, otherwise not. In doubtful cases, the courts incline to hold that the mortgage relation still exists. These propositions are very well established."

The foregoing principles are as applicable to personal property as they are to real property and apply to corporate stock issued in the name of the pledgee who claims to be the owner. *Brick v. Brick*, 98 U.S. 514; *Cabrera v. American Colonial Bank*, 214 U.S. 224; *Morgan's Assignees v. Shinn*, 15 Wall. 105; *Clarke v. Fast*, 128 Cal. 422, 425, 61 Pac. 72; *Golden v. Fischer*, 27 Cal. App. 271, 149 Pac. 797; *People v. Robinson*, 107 Cal. App. 211, 290 Pac. 470; *Meyer v. Thomas*, 18 Cal. App. 2d 299, 63 Pac. 2d 1176; *Murray v. Butte-Monitor Tunnel Mining Co.*,

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[26] *Lewis v. Wells*, 85 Fed. 896; *Smith v. Perry*, 155 Ky. 686, 160 S.W. 247; *Dean v. Radford*, 137 Mich. 617, 101 N.W. 598; *Hudkins v. Crim*, 72 W.Va. 418, 78 S.E. 1043; *Brown v. Gaffney*, 28 Ill. 149, 157, 158; *Chance v. Jennings*, 159 Mo. 544, 61 S.W. 177, 181.

41 Mont. 449, 110 Pac. 497; *Hodgson v. Burroughs*, 175 Md. 413, 2 Atl. 2d 407, 413; *Brown v. New York Life Ins. Co.*, 22 F. Supp. 82; *Mount Tivy Winery v. Lewis*, 134 Fed. 2d 120 (9 Cir.); *Western Underwriting & Mortgage Co. v. Valley Bank of Phoenix*, 237 Fed. 45 (9 Cir.); *Chapin v. Tampoorlos*, 325 Ill. App. 219, 59 N.E. 2d 334; *Sullivan v. Lewis*, 170 Wash. 413, 16 Pac. 2d 834; *Manufacturers Trust Co. v. Chris Schroeder & Son Co.*, 224 Wis. 580, 271 N.W. 915.[27]

In *Brown v. New York Life Ins. Co.*, 22 F. Supp. 82, the court held that an assignment of life policies to a bank, purportedly absolute, was a pledge. It said (p. 86):—

> "It would be unreasonable to assume that a bank would engage in the business of dealing, in the first instance, in life insurance policies. The possession of the notes from the insured to the banks raises the presumption that the policies were assigned as collateral security for the payment of the notes. Furthermore, there is no evidence that the banks bought the assignments or paid anything for them, nor was Brown's indebtedness lessened thereby. The transaction had its origin in the fact that Brown was indebted to the bank."

In *Schmitt v. Wright*, 317 Ill. App. 384, 46 N.E.2d 184, the owner of stock of a corporation transferred it to creditors of the corporation. It was held that the transaction was not a "sale" and that the transaction was "a pledge of the plaintiff's stock to secure a debt, giving the defendants as additional security the right to enter into possession and control of the business and properties for the purpose of repaying the debt from the

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[27] To the same effect, *Williams v. Chadwick*, 74 Conn. 252, 50 Atl. 720; *Susman v. Whyard*, 149 N.Y. 127, 43 N.E. 413; *Martin v. Bankers Trust Co.*, 18 Ariz. 55, 156 Pac. 87; *Smith v. Becker*, 192 Mo. App. 597, 184 S.W. 943; *In re American Fibre Reed Co.*, 206 Fed. 309, aff'd as *Home Bond Co. v. McChesney*, 239 U.S. 568; *Union Securities Inc. v. Merchants Trust & Savings Co.*, 205 Ind. 127, 185 N.E. 150.

operations." In *Anderson Bros. Mfg. Co. v. Larson*, 61 N.E. 2d 410 (Ill. App., 1945), it was held that a "collateral holding of stock could not be converted to ownership of the stock without crediting the note evidencing the debt secured with the value of the stock at the time of alleged conversion to ownership."

POINT TWO

THE DISTRICT COURT HAD JURISDICTION

I.

THE SUIT IS NOT ONE AGAINST THE UNITED STATES BUT IS A POSSESSORY ACTION AGAINST CERTAIN INDIVIDUALS, BASED ON THEIR OWN WRONGDOING, FROM WHICH THEY ARE NOT RELIEVED BECAUSE THEY PROFESS TO ACT AS AGENTS FOR ANOTHER.

This is a suit, to recover property claimed by respondents, against individuals who, having possession when the suit was commenced, refused delivery on demand.

The discussion of the nature of the claim set forth in the complaint against the petitioners has been necessitated by the frequent mis-statements and false assumptions underlying petitioners' argument that the suit is one against the United States. Without attempting to catalog every such statement, we may note that petitioners make statements both in the Summary of their argument and repeatedly in their argument to the following effect:—

> "title * * * was validly transferred to the United States, which possession and title the United States still has and claims"; "The United States has, and claims the right to retain, possession and title to the stock * * *"; "the United States lawfully acquired possession of, and title to, the stock"; "The contract contained no limitation on the transfer"; "the United States took title to the stock lawfully, now has possession thereof, has at least documentary title, and claims an absolute title"; "under the contract here in question, respondents transferred whatever title to the stock they had to the United States which, having at least documentary legal title, claims the right itself under the contract here involved to retain it. Respondents do not now have title * * * and the avowed purpose of the present proceeding is to procure the return to respondents of the title * * * with which they have parted"; "respondents admit that the United States lawfully acquired * * * documentary title to, the stock" (Petitioner's Brief, pp. 15, 16, 30, 31, 33, 37, 38).

All such assertions are in gross error, in complete disregard of the complaint and based upon argumentative inference from petitioners' *ex parte* affidavits. Under the allegations of the complaint there was only a pledge. A pledge does not pass title; it passes only a right to possession which ceases when the debt is paid. Since, under the allegations of the complaint, the United States no longer has a right to possession, retention by the members of the Commission is not the act of the United States but the unauthorized act of individuals. As we have already seen (p. 12, supra), the United States itself has never, since the debt was paid, asserted title or any right to possession.

Petitioners also assert that, after respondents' stock certificates had been endorsed in blank and delivered in 1938, the certificates were transferred on the corporate books into the name of the Commission. There is nothing in the complaint or even in the affidavits to support the assertion, but, true or false, it is irrelevant. The situation alleged in the complaint is the same as if the contract of 1938 stated in express and unequivocal language that the stock was pledged to secure the debt, and the certificates were then endorsed in blank and delivered. Such endorsement and delivery is customary procedure when shares are pledged, and the pledgee frequently has the stock transferred to his own name so that he may vote it. He does not thereby become the owner.

The present action is not one to set aside a contract for mistake or fraud or to reform it. It seeks merely to enforce the real transaction of the parties (see pp. 57-70, supra). The arguments of the petitioners amount to the bald contention that in any case where a citizen is indebted to a government agency and makes an avowed pledge of property to secure the debt, nevertheless, if the government agents who have custody of the pledged property assert that it belongs to the United States and refuse to surrender it when the debt is paid, there is no means by which the citizen may have his day in court.

With these preliminary observations, we proceed directly to the argument.

A. For Jurisdictional Purposes the Allegations of the Complaint Are Taken as True.

In passing on the jurisdictional question raised here, a first principle is that the complaint is accepted at face value. The question is whether the court has jurisdiction of the particular claim for relief presented by the complaint. The court is "obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove" the allegations of their complaint. *Ickes v. Fox*, 300 U.S. 82, 96. They are deemed established for the purposes of jurisdiction until opportunity is had to prove them at the trial. *Philadelphia Company v. Stimson*, 223 U.S. 605; *United States v. Lee*, 106 U.S. 196, 219; *Magruder v. Belle Fourche Valley Water Users Ass'n.*, 219 Fed. 72, 78 (8 Cir.). This is always true of factual claims, but it is also true of legal assertions unless patently frivolous. *Mine Safety Co. v. Forrestal*, 326 U.S. 371 so holds:[28]—"if we assume, *as we must for the purpose of disposing of the jurisdictional issue*, that appellants' allegations including the one *that the Renegotiation Act is unconstitutional*, are true * * *" (p. 374).

Consequently, it must be taken that the 1938 transaction was only a pledge, that the lien was discharged when the debt was

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[28]Petitioners cite this case to support their criticism of the Court of Appeals for holding that "the jurisdictional and substantive questions are so interwoven that it is necessary to determine the merits in order to resolve the jurisdictional issue," petitioners arguing that in the *Forrestal* case this Court held that "jurisdictional and substantive issues were * * * distinct." That case held that a claim must be accepted for what it is stated to be in the complaint; there the claim on its face was one against the United States (see pp. 99, 100, infra) and it was unnecessary to go further. But where denial of the jurisdiction involves denial of the truth of the claim, then jurisdiction becomes interwoven with the merits, as here.

paid, and respondents, the owners, were entitled to the return of the possession from petitioners, the individuals who then had custody of the shares.

This alone is sufficient to sustain the jurisdiction. But it must also be taken as true that the law conferred no power on the Commission to acquire title to corporate stock outright; the court has jurisdiction to determine the legal issue presented by the allegations of the complaint that the officials acted without legal authority; that very allegation makes the case not one against the United States. *Northern Pacific Ry. Co. v. North Dakota*, 250 U.S. 135, 152.

B. Judgment in This Case Will Not Be Res Judicata With Respect to the United States.

The second important rule, in passing on the jurisdiction, is that, since no judgment against the United States is sought, no decision in the case will be *res judicata* with respect to the title of the United States but will only conclude the rights of the parties *inter se*. *United States v. Lee*, 106 U.S. 196, 217, 222; *Tindal v. Wesley*, 167 U.S. 204, 223; *Blondet v. Hadley*, 144 F.2d 370 (1 Cir.). Thus, in *United States v. Lee*, the Court said (at p. 222):—

> "Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, * * * the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the

United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution."

Of course, if the United States were to assert a claim, respondents would have their day in court. By raising the spurious jurisdictional question petitioners are actually seeking to deprive respondents of a day in court.

C. Respondents' Rights Are Possessory and Not Based on Contract With the United States or Title Claimed to Be Derived From the United States.

The fundamental starting point of the case is that respondents' rights are possessory, based on their ownership, and are not contractual in origin. In other words, respondents admittedly had title, that title was not derived from the United States and rested on no contract with the United States, and *they still have title unless, as petitioners claim, they lost it* by virtue of the transaction of 1938.

The right of the owner of pledged property to its return upon discharge of the debt does not originate in contract but is proprietary. An action to vindicate those rights is not contractual. While the common law forms of actions are gone, a review of the common law will show the essential nature of respondents' rights in the present case and will demonstrate that respondents do not rest upon any contract with the United States but upon the right "to recover under general law possession of specific property * * * wrongfully * * * held." *Great Northern Ins. Co. v. Redd*, 322 U.S. 47, 50.

At common law an action to vindicate the right of the pledgor to the return of his property upon payment of the debt sounded in tort, being an action in replevin, or trover and conversion, or trespass. A pledge does not pass title to the pledgee; the title and general property remain in the pledgor, and the pledgee receives merely a lien or "special property" entitling him to hold possession until the debt is paid. The duty to return does not arise from the contract of pledge but from the fact that that contract has terminated and with it any right to hold the possession contrary to the rights of the owner. *Tracy v. Stock Assurance Bureau*, 132 Cal. App. 573, 579; 23 Pac. (2d) 41; *Mount Tivy Winery v. Lewis*, 42 F. Supp. 636, 641 (D.C. Cal.); *Story on Bailments* (9th ed.), Sections 287, 345; 4 *Pomeroy's Equity Jurisprudence* (5th ed.), Sec. 1229, p. 685; 41 *Am. Jur.* Sec. 27, p. 603; *Cross v. Eureka Lake, etc. Canal Co.*, 73 Cal. 302, 306, 14 Pac. 885; *McLeod v. Bank of St. Louis*, 122 U.S. 528, 533; *Brown v. New York Life Ins. Co.*, 22 F. Supp. 82, 89; *Hodgson v. Burroughs*, 175 Md. 413, 2 Atl. 2d 407, 413.

When the debt is paid and the pledgee refuses to redeliver the pledge, "the special property which he has in it is determined, and he is henceforth treated as a wrongdoer and the pawn is at his sole risk." *Story on Bailments* (9th ed.), Sec. 341, p. 306. Thus it is pointless to say, as petitioners do, that possession was lawfully obtained. It is now wrongfully withheld, and the withholding after the right to retain possession ceased is a trespass.

If one can say that there is a promise to return the pledged article when the debt is paid, such a promise is one implied solely by law from the unlawful withholding (*Story*, Sec. 339, p. 303), and the duty to return will be enforced where no actual promise is made and despite an express provision to the contrary (*Story*, Sec. 345, pp. 308, 309; *Willcox v. Edwards*, 162 Cal. 455, 470, 123 P. 276), as is evidenced by the fact that the law, in the

circumstances discussed at pages 59-70, supra, treats and enforces a contract as a pledge despite express provisions that it shall be an outright transfer (cf. *Brown v. New York Life Ins. Co.*, 22 F. Supp. 82, 86).

The duty to return pledged property after payment of the debt is such that "the pledgee must surrender the pledge or stand liable for conversion." *Schouler on Personal Property* (5th ed.), Sec. 411(a), p. 618; *Story on Bailments* (9th ed.), Sec. 122, p. 129; 1 *Street, Foundations of Legal Liability*, pp. 246, 248, 249.

The pledgor need not resort to equity to compel return of his property after the debt is paid, as he would have to do in a suit for specific performance of a contract. He "may undoubtedly obtain complete relief at law by a tender and by an action to recover the chattel or its value" (4 *Pomeroy's Equity Jur.*, Sec. 1231, p. 688) (although he may resort to equity if other relief is necessary, *Pomeroy*, p. 688, just as here the respondents resorted to equity to enjoin sale and disposition to others). The pledgor may not only sue for conversion, but he may recover the property by an action of replevin, as well as by a bill in equity to redeem: *Restatement of the Law of Security*, Sections 24, 37; *Restatement of the Law of Torts*, Sec. 223, 237; *Latta v. Tutton*, 122 Cal. 279, 280, 283, 54 Pac. 844; *Meyer v. Thomas*, 18 C.A. 2d 299; 63 Pac. 2d 1176; *Chapin v. Tampoorlos*, 325 Ill. App. 219, 59 N. E. 2d 334; *Hodgson v. Burroughs*, 175 Md. 413, 2 Atl. 2d 407, 413; *Murray v. Farmers and Merchants Bank* (Mo. App.), 206 S. W. 577; *Mount Tivy Winery v. Lewis*, 42 F. Supp. 636, 641; *Bumiller v. Bumiller*, 179 Cal. 119, 124, 175 Pac. 897; *Horn v. Klatt*, 65 C. A. 2d 510, 517, 151 Pac. 2d 149; *People v. Tambara*, 192 Cal. 256, 219 Pac. 745;[29] *Coleman v. Fidelity Finance Co.*, 18 La.

[29] This case holds that the pledgee in such a case is guilty of embezzlement, which would not be the situation if the obligation to return was only contractual.

App. 422, 137 So. 584. The very fact that there is liability for conversion shows that the duty to return is not contractual, for conversion does not arise from breach of contract but from interference with dominion incident to ownership (1 *Street, Foundations of Legal Liability*, p. 231), and a mere failure to perform an act obligatory by contract will not constitute a conversion. *Williams v. International Harvester Co.*, 172 Ore. 270, 141 Pac. 2d 837, 841; *Restatement of the Law of Torts*, Sec. 224, Comment a.

D. Petitioners Are Personally Accountable and Suable, and the Fact That They Claim to Act as Agents of Another Is No Defense.

Thus, one who unlawfully refuses to surrender possession, after the debt is paid, has converted the pledge, is personally liable in damages to the owners, and may be compelled to return the property to the owners and those entitled to its possession (see pp. 76, 77, supra). This is true also of one who, gaining possession lawfully on his own behalf or as servant or agent of another, refuses to surrender on demand to the owner, or who attempts to transfer to others (as the complaint alleges, para. 33, R. 6), or who, being in possession, denies the owner's title. *Restatement of the Law of Torts*, Vol. 4, Sec. 237; *Restatement of the Law of Security*, Sec. 37.

One sued for trespass to, or conversion of, another's property may defend himself by *establishing* at the trial that title and right to possession belong to some one other than the plaintiff. But the fact that a defendant acts as an agent for another or relies on the title of another and claims no personal interest in the property does not exempt him from responding personally. 1 *Street, Foundations of Legal Liability*, pp. 242, 243.

As stated in *Detroit Trust Co. v. First National Bank-Detroit*, 7 F. Supp. 117 at 118:—

"The wrongful detention or withholding of possession of personal property from the owner under a claim of title inconsistent with that of the latter, and denying the right of the owner to his property, is unquestionably a conversion of the same for which an action of trover lies, particularly when such detention occurs after demand for possession of the property has been made by the owner. This is true whether the defendant bases his refusal on his own right, or assumes to act for another.' "

All this is true of government agents. As said in *Sloan Shipyards v. U. S. Fleet Corporation*, 258 U.S. 549, 567 (per Holmes, J.):—"An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts" (citing *United States v. Lee*, 106 U.S. 196). The court continued that it did not matter that the agent was a corporation rather than a single man. No more can it matter that several men are agents as here; for their act each and all must individually answer. As the court continued in the *Sloan* case (pp. 567, 568):—

"The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name."

And where the agent is an officer of the United States, the case comes under the settled rule conveniently stated in *W. A. Ross Const. Co. v. Yearsley*, 103 F. 2d 589 (8 Cir.):—

"The rule is that an officer or agent of the United States may be sued where he has exceeded his authority or acted under an authority not validly conferred; and the exemption of the United States from liability for tort does not protect its officers or agents from personal liability to per-

sons whose rights of property have been wrongfully invaded by them."[30]

What petitioners, as defendants, seek to do here is nothing more than attempt to defend a charge of tortious interference with respondents' right to possession by setting up a better right in another. They defend against the complaint by asserting that the United States has title. *The jurisdictional issue is thus seen to be a spurious one. In order to prevail on the merits, to make out a successful defense,* petitioners must establish that the United States had title. If they establish that fact, plaintiffs lose and defendants prevail,—on the merits, not for lack of jurisdiction. Conversely, if petitioners fail to establish the defense, then by necessary deduction from the premise the suit is one against individuals acting without authority or defense under any law.

II.

THE ASSERTION BY GOVERNMENT AGENTS OF TITLE IN THE UNITED STATES, WHEN PERSONALLY SUED, DOES NOT DEFEAT THE JURISDICTION. THE CASE OF *UNITED STATES V. LEE* IS CONCLUSIVE ON THE SUBJECT, AND RESPONDENTS ARE ENTITLED TO RECOVER POSSESSION.

The position of petitioners consists simply of *a bare assertion* of title or right to possession in the government, and *by that bare assertion* they seek to defeat an action against them as individuals to recover property unlawfully withheld.

That they act wholly without authority in asserting a title to the shares in the United States now that the debt secured by the

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[30] Cf. *Worcester County v. Riley*, 302 U.S. 292, 297:—

"The Eleventh Amendment, which denies to the citizen the right to resort to a federal court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer."

collateral has been paid is one of the issues tendered by the complaint. It is an issue that the court has jurisdiction to try. Yet by merely asserting that they did have authority petitioners would oust the court of jurisdiction to try the truth of their claim. In short, they claim the right to veto inquiry into the legal authority of their present actions.

It has long been settled that such a bare assertion does not clothe defendants with sovereign immunity; they may not deprive the court of jurisdiction to determine the propriety of their actions by asserting propriety.

The instant case falls directly within the authority of *United States v. Lee*, 106 U.S. 196, the leading case on the subject and one which has been recognized in numerous decisions. The facts of that case are in every material respect the same as here. The suit was one to recover possession of property which had been in the possession of officers of the government for more than ten years. The defendants claimed sovereign immunity, asserting that the property had been conveyed to the United States by a certificate of sale of a Tax Commissioner acting under public statute and therefore belonged to it; in this case petitioners claim title in the United States under the terms of an agreement. The issue there was the validity of the tax sale. Here it is the effect of the 1938 contract. This Court rejected the attempt of the defendants in the *Lee* case to oust the court's jurisdiction and established the principle that an action against government officials as individuals is not converted into an action against the United States by their assertion that they have the right and authority under the law to take or hold title for the United States. They must prove their authority; if they prove it, they establish their defense on the merits, but the jurisdiction of the court to decide the merits is unimpaired. In the *Lee* case a verdict had gone for the plaintiff and on appeal

> "The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been

> ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses" (p. 204).

The contention was rejected. Since at the pleading stage the allegations of the complaint are taken as true (see page 73), the question in the present must be considered just as if judgment had gone for plaintiffs on the merits. As said in *United States v. Lee*, at p. 219:—

> "It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration."

Because the arguments advanced by petitioners here are the old well-worn arguments always advanced in like cases and were all answered in the *Lee* case, we take the liberty of quoting somewhat fully. The court said (p. 210):—

> "*The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property.* The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

The court held (p. 218):—

> "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer

that this branch of the defence cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, *as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question.* The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

"But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

* * * * * * *

"If such [the defendant's argument] be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

"It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the contro-

versy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.

"The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations, will be seen to be small indeed compared to this evil, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations" (p. 221).

It has been repeatedly held since *United States v. Lee* that agents of the government who claim to act for the sovereign in the possession of property must establish its title or right to possession. In *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 452, this Court said:—

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." [Italics are the court's].

And again (p. 456):—

"It is no answer for the defendant to say I am an officer of the government and acting under its authority unless he shows the sufficiency of that authority."

As stated in *Correa v. Barbour*, 71 F. 2d 9, 12 (1 Cir.):—

> "It is true that the defendant cannot prove that he was in possession under lawful authority without showing that the United States had good title to the land giving it authority to authorize him to enter and possess the land. But in establishing his authority, the right and title of the United States is not at issue in the suit, but is a mere matter of evidence going to prove the character of the authority under which he holds possession * * *; and, as said in both of the Supreme Court cases above cited, a judgment in favor of the plaintiffs will not conclude the United States as to its title but only determine whether the defendant officer is or is not liable as a trespasser *and should or should not be turned out of possession.* The United States, therefore, is not an indispensable party defendant."

So also, *Tindal v. Wesley*, 167 U.S. 204; *Ickes v. Fox*, 300 U.S. 82; *Morrison v. Work*, 266 U.S. 481; *Philadelphia Co. v. Stimson*, 223 U.S. 605, and numerous other cases.

In *Tindal v. Wesley*, this Court cited *United States v. Lee* as holding that (p. 218)

> "a suit by an individual against individuals to recover the possession of property is not a suit against the United States merely by reason of possession being held by the defendants as agents of the United States and under title asserted to be in the Government"

and it gave appropriate answer to the questions (p. 212):—

> "Can the court, in such an action, decline to inquire whether the plaintiff is in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the State is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?

* * * * * * *

> *"And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff"* (p. 222).

In *Philadelphia Company v. Stimson, Secretary of War*, 223 U.S. 605, this Court said (pp. 619, 620):—

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. * * * And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. * * * And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. * * *
>
> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but *challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.*"

Answer to Petitioners' Attempt to Distinguish the Case of United States vs. Lee.

Petitioners argue (Brief, pp. 43-46) that the *Lee* case is inapplicable on several grounds. But not one is sound. One of the arguments made by petitioners is that a judgment against them in their individual capacities would not give respondents the relief they ask. The assertion is mistaken. In the *Lee* case the plaintiffs recovered possession of the land and the individual defendants were ordered to surrender it, although plaintiffs' title was not

quieted against the United States (cf. 106 U.S. 196 at 197, 221, 222) and the United States was free to sue later to quiet its title, or free to intervene. Precisely the same relief may be granted here. And see *Blondet v. Hadley*, 141 F.2d 370 (1 Cir.), which lucidly illustrates how in such a suit plaintiff may recover possession, leaving title of the United States open to *it* (as distinguished from the defendants) to assert. Claiming to be the owner of land, the plaintiff sued the defendant, an employee of the Department of Agriculture and Supervisor of a National Forest, alleging that the defendant claimed that the land was the property of the United States and further alleging that this claim "is wholly unfounded and without any right or authority." The complaint alleged that defendant had entered on the land, ordered the plaintiff's employees off, cut timber, and committed other acts which, if the plaintiff was the owner, were trespasses. Plaintiff sought two kinds of relief: (1) a declaration that he was the owner and a decree quieting his title; (2) a decree enjoining the defendant from entering upon the land and requiring restoration of possession to the plaintiff. The court held that it had no jurisdiction to grant the first relief, because it would then be passing directly on the title of the United States, but it held that it did have jurisdiction to grant the second relief. It said (p. 372):—

> "In his bill the plaintiff, in addition to asking for an adjudication with respect to title, alleges continuous trespasses on his land by the defendant and asks for relief against them, *and this puts the right to possession in issue.* To be sure, the defendant rests his claim upon the title of the United States and his authority as a federal official, but this does not raise the question of the validity of the title of the United States. What it does raise as the issue is the respective rights of the parties to possession, and the answer to it hinges not upon whether the plaintiff or the defendant has a title good against the world, but whether the plaintiff has shown by a preponderance of the evidence

that his title is relatively better than the one under which the defendant claims. In other words, the question is not which party has an absolutely valid title, but which party has the better one. So a determination of title in the case at bar does not adjudicate title as such, it only adjudicates the relative merits of the respective titles of the litigants, and from this it follows that the United States is not a necessary party. For this reason, as well as upon the authority of earlier cases, a majority of the Supreme Court in United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171, held that one who claimed to be the owner of land held and occupied by the United States for public uses but under a defective title might maintain an action of ejectment against the person or persons in charge of the property as officers or agents of the government. See Ferris v. Wilbur, 4 Cir., 27 F.2d 262, 263. That is to say, it decided that *a possessory action against a government official in actual occupancy and control of lands claimed by the United States is not an action against the United States but one against the official as an individual even though that official justified his occupation on the ground of his authority and the validity of the title of the United States.*"

In *Smith v. Reeves*, 178 U.S. 436 at 439, this Court said that "*a suit would lie by one person against another person to recover possession of specific property*, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case the settled doctrine is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the State of which he is an officer or agent."

The respondents in the instant case are seeking by this suit to vindicate their possessory rights. We have noted (pp. 75-78, above) that at common law the pledgor may vindicate his rights on refusal of the pledgee to return possession, after payment

of the debt, by actions in trover, trespass or replevin. These were all *possessory* actions, title entering into them only as it bore on the right to possession of the parties to the action. I *Restatement of the Law of Torts*, Chapter 9, Topic 2, Scope Note, and Section 221, Section 222 and Section 223, Comment on Clause g.[31] Conversion arises when "the owner or person having the right to possession has * * * been deprived of dominion over the goods. A withholding of possession under an inconsistent claim of title is sufficient." 3 *Street, Foundations of Legal Liability*, p. 160.[32] Likewise, it is settled that replevin and its statutory derivatives are possessory actions and lie wherever there is either unlawful taking OR *unlawful detention*. Cf. *Stone v. Church*, 16 N.Y.S.2d 512; 46 *Am. Jur.* 21.

Petitioners argue that respondents here will not obtain the relief they desire unless they receive more than possession, and that it is necessary for the respondents to obtain a decree commanding the petitioners in their official capacity to transfer title to the stock. The contention has no merit for several reasons.

In the first place, what the respondents delivered in 1938 was the possession of certificates endorsed in blank. They are entitled to the return of the possession of precisely what they had delivered, namely, certificates endorsed in blank, and petitioners must do what is necessary to place certificates in that condition.[33] If the United States has title to the stock, this act of

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[31]It is said in Clause g—"The unqualified refusal by one in possession of a chattel to surrender it to the person entitled to its immediate possession is, unless privileged, a conversion under the rules stated in Sections 237 to 241."

[32]As said in *Burroughs v. Bayne*, 5 H. & N. 296, conversion is the "detaining of goods so as to deprive the person entitled to possession of them of his dominion over them."

[33]In the case of stock the identical certificates need not be returned but only like certificates. Cf. *Horn v. Klatt*, 65 C.A.2d 510, 516, 151 Pac.2d 149.

transmitting possession of certificates so endorsed will not divest the United States of title or preclude the United States from asserting its title in any appropriate proceeding.

In the second place, if the certificates have been transferred into the Commission's name, and if the petitioners are correct in asserting that they may not be compelled to endorse the certificates now in their possession, this objection would go only to the form and extent of the relief, a matter appropriate for consideration only if the case is tried and the respondents prevail. If endorsement may not be obtained, respondents are entitled to have petitioners hand over possession of the certificates though unendorsed. Respondents will at least be protected against having possession pass into still other hands and thus being dispersed. Whether the respondents would then also be able to obtain a transfer on the corporate books into their own names is of no concern to the petitioners. It is not for the petitioners to contrive to withhold the respondents' property wrongfully upon the ground that respondents will be unable to protect their own rights fully by securing a transfer on the corporate books. If respondents must later litigate with the corporation, they will do so. But one thing is certain:—they are as much entitled to possession of the certificates, regardless of the name in which they stand, as the plaintiff in *United States v. Lee* was entitled to possession of the land, although a deed stood of record in the name of the United States.

In the third place, the petitioners' argument rests upon a fallacy. It assumes that because certificates have been endorsed by respondents or, perhaps, transferred into another's name, respondents have ceased to be the owners, that "title has passed out of them," that in order to vindicate their rights they must "get the title back," and that in order to get the title back they must have the certificates retransferred into their names. Every link in this chain of reasoning is unsound. The certificates are

not the stock but only evidence of the stock. When a pledgor transfers stock certificates into another's name in pledge, he is still the owner[34] and remains so though he does not have the certificates and the stock records do not reveal the fact of his ownership. Thus *California Civil Code*, Section 2888, provides:

> "Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien."

In *Borland v. Nevada Bank*, 99 Cal. 89, 33 Pac. 737, a debtor transferred certain corporate stock into another's name on the books of the corporation. Nevertheless he was held subject to a stockholder's liability for the debts of the corporation, it being held that the transfer was by way of security only. The court said (p. 739):

> "The mere transfer of his property to another does not divest him of his ownership, unless such was his intent, and manifested by suitable acts. If the person to whom the transfer is made is his creditor, his ownership will none the less be retained in the absence of any evidence respecting his motives in making the transfer, * * *. The law will make the inference therefrom that by the transaction they intended to effect that which would be of mutual benefit to each, without causing a loss to either, or giving to either an advantage which would not be presumed to have been within their contemplation. Hence, when a debtor deposits property with his creditor, in the absence of any showing as to the purpose with which the deposit is made or received, it is presumed that it was intended as a collateral security for the debt."

As we have seen (p. 76, supra), as between pledgor and pledgee the general property always remains in the pledgor and

[34] If the rights of third parties purchasing from the pledgee for value and without notice intervene, a different question may arise, but no such problem is here involved.

this is so "notwithstanding an apparent transfer of legal title to the pledgee." *Tracy v. Stock Assurance Bureau*, 132 Cal. App. 573, 579, 23 Pac. (2d) 41, and cases there cited. The same rule is stated in *Sparks v. Caldwell*, 157 Cal. 401, 108 Pac. 276, where a transfer by endorsement and delivery was held to be a pledge.

In *Smith v. Becker*, 192 Mo. App. 597, 184 S.W. 943, the transferee of stock caused it to be placed in his name on the corporate books. The transferor sued the corporation to compel it to issue a certificate to him and to place the stock in his name, and the relief was granted because it was held that the transfer had been in pledge only.[35] Such an action may later be maintained by these respondents against the corporation without making the United States a party (cf. *Virginia Coupon Cases*, 114 U.S. 270, 289; *Davis v. Gray*, 16 Wall. 203, 220).

In the fourth place, petitioners are in error in contending that to require them to endorse certificates would be to require an official act. The endorsement will do no more than effectuate the return of possession and right of enjoyment of the pledged property and will be an incident to the judgment restoring possession. If the Commission had no authority to purchase shares of stock (as we contend, pp. 25 to 40, supra), then to the extent that the Commission acted beyond its power in attempting to do so it did not take title for the United States, and the latter was not the "transferee" at all, because an agent acting beyond his authority does not act for his principal. Officers in the executive department of the government are not the government, save as they act pursuant to law and under

[35] *Brick v. Brick*, 98 U.S. 514, was also a case of transfer of stock on the books of the corporation, and *Murray v. Butte-Monitor Tunnel Company*, 41 Mont. 449, 110 Pac. 497, was a case where certificates were endorsed in blank and delivered, and in each case it was nevertheless held that the transfer was only a pledge. And see also *Golden v. Eischer*, 27 Cal. App. 271, 149 Pac. 797.

authority granted to them. *Virgina Coupon Cases,* 114 U.S. 270, 288, 290; *Magruder v. Belle Fourche Valley Water Users Ass'n.,* 219 Fed. 72 (8 Cir.). In the case last cited the court also said:

> "If the acts of the defendants done and threatened were authorized by law, they might be the acts of the United States against which a court of equity would grant no relief. But if the averments of the complaint are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. They are, therefore, not the acts of the United States, and a suit to enjoin their performance is not a suit against the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts" (p. 78).

If the Commission lacked power to acquire outright title, the transfer was void, not voidable (see pages 25-27, supra). It follows that in any action whatever taken by them with respect to the certificates petitioners will not be acting in an official capacity.

Similarly, if the transfer was a pledge as a matter of contractual construction, the United States has no further interest and the petitioners, in returning the pledged property, would not be acting in an official capacity. If they endorse the certificates, they will be performing a purely formal act, a "plain ministerial duty." It is an act which they may therefore be ordered to do without converting the action into one against the United States. *Board of Liquidation v. McComb,* 92 U.S. 531, 541; *Rolston v. Missouri Fund Commissioners,* 120 U.S. 390, 411; *Great Northern Insurance Co. v. Read,* 322 U.S. 47, 51; *Smith v. Reeves,* 178 U.S. 436, 439. In the *Rolston* case, which was cited with approval by this Court both in *Great Northern Insurance Company v. Read,* supra, in 1943, and in *Mine Safety Co. v. Forrestal,* 326 U.S. 371, in 1946, plaintiffs sued to compel the Governor of Missouri and other state officials to execute an assignment

of liens on railroad property under a state law requiring such an assignment when certain payments were made into the State Treasury. The defendants objected that the suit was one against the state and was therefore not maintainable under the Eleventh Amendment. This Court held otherwise, saying (p. 411):

> "The ligitation is with the officer, not the state. The law makes it his duty to assign the liens in question to the trustees when they make a certain payment. The trustees claim they have made this payment. The officer says they have not, and there is no controversy about his duty if they have. * * * If it has been made, the trustees are entitled to their decree."

Thus, even if the duty to endorse the certificates were thought to be a duty required of the petitioners because they are members of the Commission, it is one that they may be ordered to do. In fact, however, the case for respondents is infinitely better. The endorsement of the certificates will not even be the exercise of a duty imposed on them by Congress or by their principals, but it will be in fulfillment of a mere common law duty to return to those entitled to it possession of exactly what they or their predecessors received, a duty imposed by "general law." *Great Northern Insurance Company v. Read*, 322 U.S. 47 at 50.

Petitioners have also sought to distinguish *United States v. Lee* on the ground that there the property was seized by force and violence.[36] The property had been sold under a tax sale

[36]This is probably based on a rhetorical paragraph of the opinion reading thus (p. 219):

> "What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery."

and bought in by the United States, and the issue on the merits was not seizure by force but whether the taxes had been paid. The decision was not bottomed on the fact of seizure by force and violence but on the fact of unlawful detention. As the Court of Appeals said below (154 F.2d at 310, footnote 6):

> "These distinctions, however, are matters of degree. If it should be found upon the trial of the present case that the defendants acted without authority in the first instance, or have by subsequent conduct overreached their statutory authority, their position becomes the same as that of the officials in the Lee case."

Tindal v. Wesley, 167 U.S. 204, is a complete answer to petitioners' present attempt to distinguish the *Lee* case, for there plaintiffs had never been in possession. They had bought the property from the State of South Carolina and sued the Secretary of State, as the custodian, for possession upon his refusal to accept certain script in payment. This Court held that the principles of the *Lee* case applied, and that "the withholding of * * * possession" was the wrong (p. 222).

In *Great Northern Ins. Co. v. Read*, 322 U.S. 47, 50, this Court recognized that an action may be maintained against a government officer "to recover under general law, possession of specific property likewise wrongfully obtained *or held*," citing *United States v. Lee*, among others. Detention after the right to hold has ceased is as much a trespass as an originally wrongful taking of possession.

If the law were otherwise, officers would not only be free to seize and hold property at will, but if a citizen leased a building, rented furniture, or chartered a ship to the government for a limited term, he would be unable to gain a hearing in court if officials in possession refused to surrender at the expiration of the term upon the assertion that the government had title,

and in general citizens would be helpless against irresponsible officials. The law is clear that this is not so.

In conjunction with the contention that the *Lee* case is to be distinguished by the factor of "force and violence," petitioners also argue that there the taking was "without pretense of authority," and that there was "not even a colorable basis for the claim of the United States." The argument is not only pointless, since government agents cannot confer immunity on themselves by pretense of authority, but it is ill-conceived because its facts are in error. The taking in the *Lee* case was clearly under "pretense of authority," for it was under a tax deed, the validity of which turned on a question of fact, the refusal of the tax commissioners to permit the owner to pay the tax before the day of sale. "Color of title" is a technical term referring to possession of land under a deed purporting to convey it where the instrument is either imperfect or there is a defect in the chain of title (15 *C.J.S.* 237). The commonest example of "color of title" is a tax deed apparently valid on its face but in fact ineffective (cf. cases cited in 7 *Words and Phrases* (Per. ed.), pp. 684-686). In both *United States v. Lee*, and *Tindal v. Wesley*, supra, there was clearly "color of title," whereas in the instant case there is not. In the *Lee* case the plaintiffs went behind the deed. In the *Tindal* case the title claimed by plaintiffs came from the state. Here the plaintiffs do not ask to set aside the 1938 transfer but merely rely on the "real transaction" (see discussion at pp. 57-70, and again at p. 72, supra). Petitioners further argue that in the *Lee* case the plaintiff's property was confiscated, but certainly, if the allegations of the complaint here are true, petitioners are seeking to confiscate the respondents' property.

Right to Relief Against All Classes of Petitioners

There are several classes of petitioners:—Raymond S. McKeough, who was a member of the Commission when the action

was brought and still is; Emory S. Land, Edward Macauley, and John M. Carmody, who ceased to be members after the action was brought; and W. W. Smith and Richard Parkhurst, who became members of the Commission thereafter and were made parties by order of this Court on October 14, 1946.

All are liable. Petitioners argue that any judgment against Smith and Parkhurst would be based upon their official position, but that is not the fact. They are liable because they now have possession of respondents' property and withhold it wrongfully, not because they are government agents. The occasion for having possession may be that they have become government agents, but that is true in every case involving the principles of *United States v. Lee.*

Land, Macauley and Carmody are liable, although the extent of the relief against them is different. True, no judgment directing them to surrender possession is possible, but that is because they no longer have possession, not because they are no longer government agents. They are liable in damages and for costs. At a time when each had custody of the plaintiffs' property he refused to surrender it on demand and thereby became guilty of conversion. The fact that one has thereafter ceased to be a member of the Commission does not exonerate him from his personal liability for that wrong. One sued for withholding property of another may not eliminate his responsibility by transferring possession to a third party, as if he were a football player passing the ball to another when tackled. A defendant, called on by proper process to answer a charge of wrongdoing, may not avoid answering by substituting another in his place. The personal liability of these petitioners as individuals cannot be shifted to others without the plaintiffs' consent. *Ex parte La Prade*, 289 U.S. 444; *Gorham Manufacturing Co. v. Wendell*, 261 U.S. 1.

It was the duty of these petitioners to turn over possession to the respondents and not to their successors in office, and it

was the duty of their successors to turn over the possession to the respondents and not to retain it.

The District Court had and has the jurisdiction to proceed on the merits against each and all of the petitioners. The exact scope of the judgment as to each may await the time of judgment and has no bearing on the existence of jurisdiction.

III.

PETITIONERS RELY ON AUTHORITIES PERTAINING TO THREE TYPES OF SITUATIONS, NONE OF WHICH IS HERE INVOLVED.

In support of their contention, petitioners rely on three classes of cases, none of which is remotely relevant. The first class involves cases that in effect are suits for specific performance of a contract by the United States. The second class involves cases where the title to property had been and was admittedly in the United States and where plaintiff sought to compel a conveyance, claiming the right to receive title from the United States under some act of Congress, or otherwise sought to control the disposition of government property. The third class involves suits to recover money from the public treasury.

The present case falls in none of these classes. We consider each class separately:—

A. This Is Not the Equivalent of an Action to Compel Specific Performance of a Contract by the United States.

In cases in the first class the plaintiff had no rights except as they were created by and arose out of a contract between him and the United States. Upon breach or alleged breach of the contract by the United States, plaintiff sued to enjoin the United States official from violating the contract. Such suits were tantamount to an attempt to obtain specific performance by the United States or to collect a debt from it when the

contract was for payment of money. All these, too, were cases where, if plaintiff had a case, he could seek and obtain adequate relief in the Court of Claims, which respondents in this case cannot do (see page 110, infra).

In order to come within the principle of these cases, petitioners argue that where pledged property is unlawfully detained after the debt is paid, a suit for its return is, in effect, one for specific performance of a contract to return the shares upon payment of the debt. Hence, they argue, this is one to compel specific performance of a contract by the United States to return the shares.

The argument is based on a supposition inconsistent with hornbook law. We have already demonstrated that the supposition is wholly false and that respondents' rights are proprietary and possessory and not contractual, and we refer to pages 75 to 78, supra.

The cases cited by petitioners in conjunction with this argument are *Transcontinental & Western Air v. Farley*, 71 F.2d 288; *Boeing Air Transport v. Farley*, 75 F.2d 765; *Wells v. Roper*, 246 U.S. 335; *Mine Safety Co. v. Forrestal*, 326 U.S. 371; *Goldberg v. Daniels*, 231 U.S. 218; *Hagood v. Southern*, 117 U.S. 52; *Shoshone Irrigation District v. Ickes*, 70 F.2d 771; *In Re Ayres*, 123 U.S. 443. The utter inapplicability of these cases is evident from the merest inspection.

In *Mine Safety Co. v. Forrestal*, supra, plaintiff sought to enjoin the Assistant Secretary of the Treasury from directing government disbursing officers to withhold payments to the plaintiff on war contracts on the ground of excessive profits under the Renegotiation Act. Patently, the plaintiff's rights arose solely from the contract with the government. Plaintiff was seeking to enjoin an alleged breach, and no matter how viewed its action was a claim for money due from the government on a contract, over which the Court of Claims has jurisdiction. This Court recognized the validity of the principles upon which we rest in the present case. It said (373-375):—

"Appellant contends that the action seeks to prevent a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against appellant's property, and that equitable relief is necessary because appellant has no adequate remedy at law and since it would otherwise suffer irreparable loss. Under our former decisions, *had the factual allegations supported these contentions*, the complaint as filed would, in the absence of any further proceedings, have provided a basis for the equitable relief sought. See e.g., *Philadelphia Company v. Stimson*, 223 U. S. 605, 619-620. For according to these cases, *if we assume, as we must for the purpose of disposing of the jurisdictional issue, that appellant's allegations* including the one that the Renegotiation Act is unconstitutional *are true*, the fact that the Secretary had acted pursuant to the command of that statute would have made no difference. *These cases hold that a public officer can not justify a trespass against a person's property by invoking the command of an unconstitutional statute.* Under such circumstances, the tort becomes the officer's individual responsibility, and the government is not held to have sufficient interest in the controversy to be considered an indispensable party. * * *

"Here, the essential allegations and the relief sought do not make out a threatened trespass against any property in the possession of or belonging to the appellant. * * * The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, *this is an indirect effort to collect a debt allegedly owed by the government* in a proceeding to which the government has not consented."

Wells v. Roper, 246 U.S. 335, was a suit to enjoin the First Assistant Postmaster General from annulling a contract between the United States and the plaintiff to carry the mails and was therefore nothing more than an action to compel the United States not to violate the contract and to continue to accept services tendered under the contract and to pay compensation

for those services. The two *Farley* cases were similar, arising from cancellation by the Postmaster of contracts to carry air mail. The air lines' suits to enjoin the cancellation were no more than an attempt to obtain specific enforcement against the United States, whereas the remedy was in the Court of Claims for damages for the breach.

Goldberg v. Daniels, 231 U.S. 218, was a petition for mandamus to direct the Secretary of the Navy to deliver to the plaintiff a United States cruiser upon an alleged contract of purchase and sale. The plaintiff's rights, if any, arose entirely from the alleged contract.

The essence of *Hagood v. Southern*, supra, appears in the headnote:—

> "When a suit is brought in a court of the United States against officers of a State to enforce performance of a contract made by the State, and the controversy is as to the validity and obligation of the contract, and the only remedy sought is the performance of the contract by the State, and the nominal defendants have no personal interest in the subject matter of the suit, but defend only as representing the State, the State is the real party against whom the relief is sought."

In Re Ayers, supra, is similar, as is *Louisiana v. Jumel*, 107 U.S. 711.

The distinction between this class of cases and the instant case is illustrated by contrasting *Ickes v. Fox*, 300 U.S. 82, which affirmed a decision of the Court of Appeals for the District of Columbia, 85 F. 2d 294, with the decision of the same Court of Appeals in *United States ex rel Shoshone Irrigation District v. Ickes*, 70 F. 2d 771. Both cases arose out of irrigation projects. The *Shoshone* case was a suit for writ of mandamus to compel the Secretary of the Interior to credit the Shoshone Irrigation District with a share of net profits from power plant operations under a contract whereby the district had been engaged to

operate the project for the United States and the latter had agreed, as part of the compensation for the services, to pay a share of the profits. The action was held to be not maintainable, as it was no more than a suit for specific performance of the contract with the United States, or, in other words, a suit to compel payment of the monies which the United States had agreed to pay for services rendered. *Ickes v. Fox* was an action to enjoin the enforcement of an order of the Secretary of the Interior which would deprive plaintiffs of the right to certain quantities of water for irrigation. According to the allegations of their complaint, the plaintiffs, by making all stipulated payments to the government and by complying with all obligations to it, had already acquired a vested right to the use of certain amounts of water. It was held that the suit was not against the United States. We quote (p. 96):—

> "The fallacy of the contention is apparent because the thus-far undenied allegations of the bill, as already appears, *demonstrate that respondents have fully discharged all their contractual obligations; that their water-rights have become vested; and that ownership is in them and not in the United States.* The motion to dismiss concedes the truth of these allegations; but even if they were denied, we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove them. *United States v. Lee*, 106 U. S. 196, 218, 219; cf. *Tindal v. Wesley*, 167 U. S. 204, 21[illegible], et seq. * * *
>
> "The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessors in office."

B. This Suit Is Not One to Compel the United States to Part With an Admitted Title or to Control Disposition of Property Admittedly Owned by the United States.

The second group of cases relied on by petitioners are cases such as *Oregon v. Hitchcock*, 202 U.S. 60; *Minnesota v. Hitchcock*, 185 U.S. 373; *Naganab v. Hitchcock*, 202 U.S. 473; *Louisiana v. Garfield*, 211 U.S. 70; *Morrison v. Work*, 266 U.S. 481. These are cases where the title to land had been and was admittedly in the United States and where the plaintiff sought to compel a conveyance, claiming the right to receive title under some act of Congress or otherwise sought to control the disposition of government property.

In the instant case the respondents claim no title under any law granting government property to them and rest no title on a contract with the United States. Their claim is that they have title despite the contract. Their title antedated the contract. The contract of pledge has served its purpose, has been exhausted and is functus officio: The contract comes into the case only because it is invoked as a basis of defense by the individual defendants and can serve as such only if construed as they would construe it.

In *Oregon v. Hitchcock*, the State of Oregon claimed that it was entitled to receive from the United States title to certain parts of the public domain under swamp land acts, and it sought to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from patenting the land to Indians. The court said (p. 70):—

> "Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. * * * So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land

Department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."

Louisiana v. Garfield, supra, is identical with *Oregon v. Hitchcock*.

Minnesota v. Hitchcock, supra, was a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling certain lands which belonged to the United States, on the ground that the State of Minnesota should receive the lands under certain federal school land acts. The essence of the case was stated thus (p. 387):—

"Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State."

Morrison v. Work involved the question whether the United States held title as trustee for Indians individually or as guardian for the tribe. That it held title was an admitted fact, and the purpose of the suit was to control the manner in which the United States administered its trust. As the court said (p. 486):—

"The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer, of the Government to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, or that Congress lacked the power to confer the authority exercised. In those cases the act complained of either involved an invasion or denial of a definite right of the plaintiff, or it operated to cast a cloud upon his property. In some of those cases the defendant would have been liable individually in trespass unless he could justify;

under authority conferred. Morrison and the other Chippewas have no right of that character. *The lands ceded are the property of the United States. It has, confessedly, power to dispose of them.*".

Cunningham v. Macon, etc. Railroad Co., 109 U.S. 446, was a suit against a railroad and the Governor and Treasurer of the State of Georgia to foreclose a second mortgage on the railroad. The State of Georgia had held the first mortgage, had foreclosed, and had bought the railroad at the foreclosure sale. The suit thus sought to foreclose a lien on property admittedly owned by the State, which was therefore a necessary party.

Belknap v. Schild, 161 U.S. 10, was a case of attempt to enjoin use of property admittedly that of the United States.

C. Suits to Recover Money From the Public Treasury Are of No Analogy.

Finally, petitioners argue that "the case is no different from the cases where an attempt is made to reach money in the possession of the Government." (Brief, pp. 16, 42). The cases cited involve attempts to recover public funds from the public treasury. Actions to recover possession of specific property have always been regarded as governed by different principles, the very cases cited by petitioners on this subject[37] so state, and the distinction has often been made (cf. *Virginia Coupon Cases*, 114 U.S. 270, 293. Money is fungible, and once it is commingled with public funds in the Treasury, it ceases to be earmarked. It is equally established, however, that, if funds unlawfully taken

[37] *Smith v. Reeves*, 178 U.S. 436, 439: "This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this Court is that the question of possession does not cease to be a judicial question—as between the parties actually before it—because the defendant asserts or suggests that the right

by a government agent have not passed into the Treasury, an action may be maintained against the agent who has possession to recover the funds, and the suit is not barred on the theory of sovereign immunity. *Atchison, etc. Railway Co. v. O'Connor*, 223 U.S. 280, 287; *United States v. Peters*, 5 Cranch 115; *Osborn v. United States Bank*, 9 Wheat. 737, 741, 842, 858; *Louisiana v. Jumel*, 107 U.S. 711, 720, 724, 726, 727. Thus in *Smith v. Reeves*, 178 U.S. 436, 439, it is observed that there "the action is not to recover specific moneys in the hands of the State Treasurer * * *." In *United States v. Ferguson*, 78 Fed. 103 (2 Cir.), a thief stole money from a post office. Upon his arrest, the arresting officers took money from his person, erroneously believing it to be the stolen funds and turned it over to the postal inspector, who retained custody. The thief assigned the right to recover the impounded funds, and the assignee brought suit against the inspector and was given judgment. It was held that the claim to the money was not one against the United States, that at the time when the assignment was given,

> "the inspector had no authority, under the laws of the United States, or no color of authority, to take into his possession and assume to retain money belonging to Atwood, even though Atwood had stolen an equivalent sum of government moneys from a post office. * * * So long as the money was in the hands of the inspector, or if his superior officer, the postmaster general, there was no claim against the United States, and only one against the officers of the government, who had transcended their authority, and made themselves individually liable for the consequences.

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of possession is in the State of which he is an officer or agent. Lindal v. Wesley, 167 U.S. 204, 221, and authorities there cited."

Great Northern Insurance Co. v. Read, 322 U.S. 47, 50:—"The case * * * is plainly distinguishable from those * * * to recover under general law possession of specific property * * * unlawfully obtained or held."

IV.

DOCTRINE OF SOVEREIGN IMMUNITY HAS LONG BEEN N DISFAVOR AND DECAYING AND BY VIRTUE OF STAT-UTES ENACTED BY CONGRESS IN 1946 IS NOW NONEXIS-TENT. IF THIS SUIT COULD NOT THERETOFORE HAVE BEEN MAINTAINED FOR LACK OF CONSENT OF THE SOV-EREIGN DESPITE THE UNLAWFUL WITHHOLDING OF RESPONDENTS' PROPERTY, THE NEW "ADMINISTRATIVE PROCEDURE ACT" HAS CONSTITUTED CONSENT BY CON-GRESS TO THE MAINTENANCE OF THE ACTION.

an enlightening discussion of the subject of sovereign im-y, this Court in *Keifer & Keifer v. Reconstruction Finance oration*, 306 U.S. 381, showed that the legislative policy of ress is in the direction of limiting, not of extending, that nity, and that the present climate of opinion has brought nment immunity into disfavor. In *Federal Housing Admin-ion v. Burr*, 309 U.S. 242 at 245, this Court again referred e "current disfavor of the doctrine of government immunity suit." So also *Cherry Cotton Mills v. United States*, 326 705.

e opinion of the Court of Appeals in this case adverted to ame matter. Petitioners have misconceived the remarks of ourt below on this subject and have sought to present to Court the question whether the Court of Appeals erred in ng that the United States Maritime Commission, as an y of the United States, was a suable entity. Respondents predicated their suit, and the Court of Appeals based its nent, on the principles expressed in *United States v. Lee*, . The reflections of the Court of Appeals on the suability e Commission as such were in connection with its obser-n that the doctrine of sovereign immunity had decayed, cularly where government agencies were engaged in under-gs "commercial and corporate in character." (See R. 167;

154 F.2d 307, 310, second column), and were prefaced by the remark that they did "not alter the basic problem." These remarks of the court were at least prophetic, for less than three months later, on June 11, 1946, Congress enacted the *Administrative Procedure Act*, and on August 2, 1946 it enacted the *Federal Tort Claims Act*. By the *Federal Tort Claims Act* (Public Law 601—79th Congress, Title IV, Section 401, et seq.) Congress consented to suits against the United States on certain tort claims arising after January 1, 1945. The Joint Committee on the Organization of Congress stated, in its Report to the House on the Legislative Reorganization Act of 1945, of which the Federal Tort Claims Act is a part, that "The Government should be put in the same position as any private party." That Report (at pages 35 and 36) contains an historical review of the decay of the doctrine of sovereign immunity, points out that many years ago Congress had consented to suit on contract claims and step by step had consented to suits for patent infringement and maritime torts, and that "the existing exemption in respect to common law torts appears incongruous. Its only justification seems to be historical."

Approximately two months before the enactment of the *Federal Tort Claims Act*, Congress enacted the *Administrative Procedure Act* (Public Law 404—79th Congress, Chapter 324—2d Session), which became effective on September 11, 1946. Not only does that act illustrate the continued decay of the doctrine of sovereign immunity, but, if the present suit is one against the United States, then the act is a consent by the United States to be sued in the present case. We quote in Appendix II the relevant sections of this act.

The *Administrative Procedure Act* provides for judicial review of the actions of all agencies of the United States. Section 10 provides that unless a statute specifically precludes judicial review or commits agency action to agency discretion,

"Any person suffering legal wrong because of any agency

action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Subsection (c) of Section 10 provides that

"Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

Section 2, subsection (g), defines "agency action" as including any "sanction," and subsection (f) of the same section states that "'Sanction' includes * * * (4) destruction, taking, seizure, or *withholding of property*." Subsection (a) of Section 2 defines an agency as meaning every authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia.

Thus, it follows that the statute confers upon every citizen the right of judicial recourse against unlawful withholding of property.

Section 10, subsection (b), provides that

"The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction."

The House Report on this Act (House Report No. 1980, May 3, 1946) describes it as setting "forth a simplified statement of judicial review designed to afford a remedy for every legal wrong (Sec. 10)." And see Senate Report No. 752 (79th Congress, 1st Session), at pages 195, 211, 214 of Senate Document No. 248 (79th Congress, 2d Session).

It follows that parties in a like situation to the plaintiffs could maintain an action in the United States District Court for the

District of Columbia against the Commission and its members to obtain the return of property which they claim to be theirs, providing that they have no other adequate remedy. If the instant action is maintainable under the principles of *United States v. Lee*, supra, as we contend, it may be an adequate remedy precluding recourse to the *Administrative Procedure Act*. But if this Court should hold that the action is not maintainable under the principles of the *Lee* case, then there is no remedy outside the *Administrative Procedure Act*.

Respondents obviously have no remedy in the Court of Claims under the *Tucker Act*. Such an action may be maintained only if it sounds in contract—"in cases not sounding in tort." Title 28 *U.S.C.*, Sec. 250; *Pearson v. United States*, 267 U.S. 428; *Klebe v. United States*, 263 U.S. 188. Moreover, only money may be recovered in the Court of Claims, and no judgment may be entered by that court for delivery of possession of property. *Hart v. United States*, 91 Ct. Cl. 308; *United States v. Jones*, 131 U.S. 1; *United States v. Alire*, 6 Wall. 573; *Kirk v. United States*, 131 Fed. 331, aff. 204 U.S. 668.[38]

Likewise, while the *Federal Tort Claims Act* permits suits against the United States on tort claims arising after January 1, 1945, the relief provided for by the Act is expressly stated to be "for money only * * * on account of damage to or loss of property or on account of personal injury or death * * *" etc.

What respondents in the instant case desire, and what they are entitled to have, if they prove the allegations of their complaint, is the return of the property itself.

Patently, a person whose property has been unlawfully and fortiously withheld by a government officer should not be con-

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[38] In the case last cited plaintiff sought to enjoin both the United States and the United States Marshal from unlawful seizure of property. The complaint was dismissed against the United States, but an injunction was issued against the marshal on the authority of *United States v. Lee*, supra.

fined to the recovery of damages. To so hold would be tantamount to ruling that any government officer is empowered by indirection to exercise the power of eminent domain by committing a tortious conversion, thereby divesting the citizen of property and binding the government to pay its value. Thus, by indirection, government agents could do just what Sections 11 and 14 of Title 41 *U.S.C.* expressly forbid them from doing, i.e., make purchases of land and other property for the United States.

It is evident that Congress intended to confer on the public the right to complete redress for wrongs committed by the government or its agents. The absence of mention in the *Federal Tort Claims Act* of tort actions to recover property in kind was not based on a desire to make an exception, in such cases, to the enlightened doctrine. Obviously, the reason that no provision was made in that act for such cases was that, in view of the long existing and well recognized rule of *United States v. Lee*, supra, no such provision was necessary: adequate relief was already available by means of suit against the agent or official of the government as an individual. And moreover, by the *Administrative Procedure Act*, enacted two months earlier, actions for wrongful withholding of property by government agents could be maintained against the agency as such.

It is in the climate of opinion that we have described above that petitioners seek to attach immunity to a suit of a character in which, ever since the *Lee* decision over sixty years ago, it has been settled that there is no immunity and in which they seek to deprive respondents of any remedy whatever for an attempted unlawful confiscation of property. Moreover, it would be an idle act to affirm the dismissal of the present action on the ground of sovereign immunity, when it would only be necessary, under the *Administrative Procedure Act*, for the plaintiffs to file a new action in the same court alleging the identical claim for relief. The law neither does nor requires idle acts.

It is true that the *Administrative Procedure Act* was enacted after the present action was instituted and after the decision of the Court of Appeals. Nevertheless, if the sovereign may not be sued without its consent, and if the present action were to be held to be a suit against the sovereign, this act is consent and validates maintenance of the action. The sovereign, which in the United States acts through Congress, may at any time during the course of an action either grant or revoke consent to be sued (*The Davis*, 10 Wall. 15 at 20; *Cummings v. Deutsche Bank*, 300 U.S. 115; *Lynch v. United States*, 292 U.S. 571), and proceedings in the action thereafter must be governed accordingly. An act extending jurisdiction applies to pending cases (*Larkin v. Saffarans*, 15 Fed. 147). This is equally true when the consent is granted or jurisdiction given while the cause is on appeal, for, if subsequent to a judgment and before decision of the appellate court, a law intervenes and changes the governing rule, the appellate court must apply the new law unless rights of private individuals are unconstitutionally lessened (*United States v. The Peggy*, 5 Cranch 102, 110 (per Marshall, C.J.); *Martin v. Hunter's Lessee*, 1 Wheat 304; *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78; *Watts, Watts & Co. v. Unione Austriaca* etc., 248 U.S. 9, 41). Thus, the decision of the Court of Appeals must be affirmed regardless of whether or not it were deemed erroneous when rendered. (*Pugh v. McCormick*, 14 Wall. 361).

POINT THREE

THE CASE CANNOT PROPERLY BE DISPOSED OF SUMMARILY UPON MATTERS OUTSIDE THE COMPLAINT, EITHER UPON THE MERITS OR THE "JURISDICTION."

Petitioners insist upon referring to the affidavits filed by them below in opposition to plaintiffs' motion for an interlocutory injunction. We have already pointed out that the District Court did not try or decide *any* factual issue, and that it did not base its order of dismissal on the affidavits in any part (see pp. 12 to 16, supra). The only indication given by it of the reason for its order was that it believed that under Section 207 of the *Merchant Marine Act of 1936* the Commission had legal authority to acquire outright title to shares in private corporations; proceeding from this premise alone—a pure conclusion of law—it arrived at its jurisdictional conclusion, without considering or deciding any issue of fact.

This alone disposes of petitioners' attempt to invoke their affidavits. But regardless of what the District Court did or did not do, that attempt cannot be supported.

Petitioners seem to rely on the principles applicable to a "speaking motion to dismiss." Such a motion is treated by the courts which recognize its use as governed by the same principles as a motion for summary judgment.[39]

Although petitioners made no motions of any kind, either to dismiss or for summary judgment, they argue that a court has the same power to act *sua sponte* as it could on such motions. We agree that the District Court could not of its own

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[39] Cf. cases cited in 1 *Moore's Federal Practice*, 1945 Supp., pp. 260-264, and the *"Report of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States,"* submitted to this Court by the Advisory Committee under date of June 14, 1946, concerning proposed amendment of Rule 12(b); this report is printed in 5 F.R.D. 436-502.

motion make a disposition of the case that it could not make on a motion for summary judgment. And the dismissal here cannot be supported, either on the merits or the jurisdiction, upon any applicable principle. Petitioners do not contend in this Court that a summary judgment on the merits could be granted, but, since the issue of fact on jurisdiction is identical with that on the merits, we first consider the subject relative to the merits.

I.

NO SUMMARY JUDGMENT COULD HAVE BEEN GRANTED ON THE MERITS BECAUSE OF THE PRESENCE OF A GENUINE ISSUE OF FACT.

A summary judgment may be granted only if it appears that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rules of Civil Procedure*, Rule 56, Subd. (c). On a motion for summary judgment the court may only decide whether there is an issue—it may not decide the issue (see 3 *Moore's Federal Practice*, p. 3184, and the numerous cases cited in the 1945 Pocket Supplement at pages 177-180). Such a motion may not be perverted to the trial of disputed questions of fact upon affidavits; it is no substitute for existing methods of trials of issues of fact. It can only be granted upon evidence which a jury would not be permitted to disbelieve in a jury case and which would require a directed verdict. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620; *Arenas v. United States*, 322 U.S. 419; *United States v. Broderick*, 59 F. Supp. 189; *Bowers v. E. J. Rose Mfg. Co.*, 149 F.2d 612, 615 (9 Cir.); 3 *Moore's Federal Practice*, p. 3184; *Walsh v. Walsh*, 18 Cal. 2d 439, 444, 116 Pac. 2d 62; *Gravenhorst v. Zimmerman*, 236 N.Y. 22, 139 N.E. 766, 772. An affidavit of a defendant denying allegations of a complaint which, if true, make him liable, will not support a summary judgment. *United States v. Broderick*, supra, at 192; *Farrall v. District of Columbia Amateur Athletic Union*, 153 F.2d 647 (C.A. D.C.).

A summary judgment may not be granted where the record discloses any possible basis for a claim in plaintiff (*Veatch v. Standard Oil Co.*, 49 F. Supp. 45), any genuine issue of fact (*Henderson v. Glosser*, 46 F. Supp. 458) or any material issue (*Acadian Production Corp. v. Landé* 136 F.2d 1 (5 Cir.). A plaintiff stating a cause of action cannot be compelled to submit his evidence in the form of affidavits and may ignore affidavits of his adversary. *United States v. Broderick*, supra, at 192.

In the Report of the Advisory Committee on the Rules of Civil Procedure, the Committee said, relative to Rule 12(b):—

> "The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact." (5 F.R.D. 443)

It is apparent that even if it were permissible to resort to the affidavits to determine whether a claim for relief is sufficiently stated to entitle the respondents to a trial, the affidavits do not demonstrate the absence of a genuine issue of fact. It is only necessary (1) to refer to the discussion appearing under Point One of this brief (pp. 20 to 70, supra) concerning the nature of plaintiffs' claim for relief, (2) to note (a) that the contract of August 15, 1938 bears on its face the strongest, if not conclusive, indicia that it was a pledge, (b) that extrinsic evidence is admissible to show that even a transfer absolute in form is only a security transfer, (c) that in transactions between creditor and debtor whereby the debtor transfers property to the creditor, the burden of proof to sustain the transaction as an absolute transfer rests heavily on him who so asserts, and (3) to review the nine principles listed on pages 57, 58, supra, in order to conclude that the items carefully selected by petitioners and stated in their affidavits are either meaningless, pointless, equivocal in significance, or, at the utmost, merely tend to raise an issue of fact.

The Affidavits Come Close to Demanding a Summary Judgment for Respondents.

In fact, certain exhibits attached to the affidavits of petitioner Land come close to demanding a summary judgment for the plaintiffs.

The affidavits themselves are wholly incompetent. Rule 56(e) of the *Rules of Civil Procedure* provides that affidavits submitted in support of a motion for summary judgment "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The affidavit of Land (R. 21), for example, violates this rule because it is replete with hearsay, conclusions, paraphrase of documents, and statements on information and belief.

But attached to Land's affidavit as Exhibit A-2 is a copy of a Special Report of the Commission to Congress, signed by the petitioner Land, dated April 10, 1939, and entitled "Reorganization of American President Lines, Ltd." Attached as Exhibit A-1 is a copy of a booklet entitled "Financial Readjustments in Dollar Steamship Lines, Ltd." issued by the Commission, dated February 17, 1938. These reports are replete with admissions against interest, the truth stands revealed, and the reports are all the more damning because they were prepared as self-serving, self-justifying and self-laudatory documents. Being self-serving, they cannot be used by the petitioners in support of their defense, but they can be used in evidence by respondents as admissions against interest.

We attach to this brief as an appendix a statement prepared directly from these reports. We not only submit that the facts there revealed demolish any claim that petitioners are entitled to a summary judgment, but we also submit that when these facts are proved at a trial and are compared with the applicable principles discussed at pp. 57, 58, *supra*, a judgment for the plaintiffs will be inevitable.

In summary, these reports demonstrate:

(1) The transfer of the stock of Dollar of Delaware, made pursuant to the agreement of August 15, 1938, was the culmination of negotiations, transactions and events beginning as early as June 30, 1937.

(2) At that time the parties bore to each other the relation of debtor, creditor and surety; Dollar of Delaware was a debtor of the Maritime Commission and the debt was secured in two ways, (a) by mortgage on this debtor's ships, and (b) by the personal obligation of respondents R. Stanley Dollar and Dollar of California as additional security for part of the indebtedness.

(3) The negotiations began, and they proceeded, with the repeated and insistent demand by the Maritime Commission upon the debtor and its stockholders for better security and collateral to secure the indebtedness due from Dollar of Delaware, and the primary insistence of the Commission was upon obtaining the voting and management control of Dollar of Delaware as that security.

(4) At no time in the course of the negotiations was the character of the demands changed or altered from a demand for collateral to a demand for an outright transfer of title and certainly not to a demand for such a transfer without any reduction of the indebtedness.

(5) Throughout the entire period the Maritime Commission, the creditor, occupied a superior position; the debtor, Dollar of Delaware, was in a necessitous and inferior position; and the Commission deliberately, consciously, and avowedly sought to take advantage of the debtor's necessities.

(6) The negotiations culminated as they had begun and as they had proceeded, as pertaining to a security transaction.

We place this statement in an appendix instead of in the body of the brief because, as we submit, resort to the affidavits is wholly improper, since they were filed in opposition to the mo-

tion for an interlocutory injunction and are available for no other purpose.

II.

A DISPOSITION OF THE JURISDICTIONAL ISSUE BY SUMMARY DETERMINATION OF THE FACTS IS NOT PROPER.

Petitioners' argument in the District Court and in the Court of Appeals was that they could deprive the court of jurisdiction to determine the propriety of their conduct by the bare assertion by them of title in the United States. That argument being clearly unsound (see pp. 71 to 106, supra), they urge in this court for the first time a modified argument. They contend that on the so-called "jurisdictional issue" the court may make a summary disposition by trying the facts on their *ex parte* affidavits. *But since the so-called jurisdictional question is identically the same as the merits of the case,* petitioners' request is quixotic because it asks the court to do, under the disguise of jurisdiction, what it cannot do directly, that is, dispose of the merits summarily on affidavits, all for the purpose of denying respondents a full trial in the usual manner of the law. In short, the merits are to be summarily decided against respondents for fear that they will be decided in favor of respondents if tried fully.

It is a semantical vice to confuse unlike matters because they bear similar names, and it is inexact usage to describe the question here involved as a jurisdictional one at all. It is a question of sovereign immunity. It does not involve any question of the "jurisdiction" of a particular court, for, if it is the sovereign that is being sued, no court can act. The question is obviously different from such jurisdictional elements as amount in controversy or citizenship. Thus in *Illinois Central R.R. Co. v. Adams,* 180 U.S. 28, it was said:

> "The question whether this is a suit against the State within the Eleventh Amendment to the Constitution * * * is also one which we think belongs to the merits rather than to the jurisdiction. [p. 37]
>
> * * * * * * * *

"* * * where the suit is against an individual by name, and he desires to plead an exemption by reason of his representative character, he does not raise a question of jurisdiction in its proper sense. As already observed, this question depends upon the language of the statute, *although the word 'jurisdiction' is frequently, and somewhat loosely, used to indicate the right of the plaintiff to sue, or the liability of the defendant to be sued, in a particular case* * * *. [p. 38]

"But whether this be a question of jurisdiction or not, we think it should be raised either by demurrer to the bill, or by other pleadings in the regular progress of the cause. Motions are generally appropriate only in the absence of remedies by regular pleadings, and cannot be made available to settle important questions of law, or to dispose of the merits of the case * * *. [p. 38]

"* * * The difficulty we find in the case is that the defendant has confused that which is jurisdictional with that which is not, and has attempted to forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits." [p. 40].

In *Great Northern Ins. Co. v. Read*, 322 U.S. 47, at 49, and in footnote 2, it is indicated that the question is not one of jurisdiction but is part of the objection that there is no claim for relief alleged or established.

But assuming that the question is a jurisdictional one, there are still four reasons why petitioners' argument is unsound:

1. It is settled that *in the type of jurisdictional question here involved, if it is a jurisdictional question, the allegations of the complaint must be taken as true.* If those allegations sustain the jurisdiction, the jurisdiction is not lost because, forsooth, the allegations may not be proved. We refer to the discussion of the matter at pp. 73, 74, supra.

2. Even if the court were free to go behind the allegations of the complaint, the same rules and the same disposition must

apply to the same issues of fact whether the issues be called "merits" or "jurisdiction."

Petitioners belabor the question of the *power* of a District Court to inquire into jurisdictional questions and to try them preliminarily. But the question of *power* to make such an inquiry is largely irrelevant here. As we read petitioners' discussion, they derive the power from two separate sources: They treat it (1) as power to act as if on a "speaking motion to dismiss" for lack of jurisdiction, and (2) as a power said to be derived from Section 37 of the Judicial Code.

With respect to the power to act as if on a "speaking motion to dismiss," petitioners argue (Brief, footnote 13, p. 25) that while courts have doubted the power to grant speaking motions to dismiss on the merits, they recognize the power to grant such motions for lack of jurisdiction. But the cases cited assimilate that power to the power to grant a motion for summary judgment (cf. *Central Mexico Light & Power Co. v. Munch*, 116 F.2d 85 (2 Cir.)), and therefore the dismissal may be made only if there is no genuine issue of fact and the affidavits raise only a question of law (*Gallup v. Caldwell*, 120 F.2d 90, 93). As we have seen, there is a genuine issue of fact here.

The same result follows if the power is derived from Section 37 of the Judicial Code. The cases cited by petitioners arising under that section all involve a true jurisdictional question, such as citizenship or amount in controversy. We do not believe that the issue under discussion is one of jurisdiction (see authorities cited on pp. 118, 119, supra), or that section 37 has any application to the kind of jurisdictional question here involved even if it can be called a jurisdictional question.[40] But we do not

[40]Section 37 comes directly from the Act of March 3, 1875 (18 Stat. 470) and is part of an act conferring jurisdiction on the Circuit (now the district) courts and therefore pertains to the jurisdictional elements peculiar to such courts. The cases all so treat it (cf. footnote 10 in *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 287).

pursue the matter because, even assuming application of Section 37, it is settled that if a factual inquiry into the jurisdictional question is made before trial, evidence to sustain the jurisdiction on such preliminary inquiry need not be as clear as that to establish the fact on the merits, because a "suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, *create a legal certainty* of that conclusion" (*Wetmore v. Rymer*, 169 U.S. 115 at 128, reversing a judgment of dismissal; *St. Paul Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289).

While Section 37 does not prescribe the manner in which the court shall examine into the jurisdictional facts and leaves the District Judge free to adopt an "appropriate mode," disposition on affidavits is "appropriate" only if they disclose that there is no genuine dispute of material fact. If a question of fact is presented, it should "only be decided upon a hearing had either before the court or by reference to a master." Cf. *Davis v. Schackleford*, 91 F. 2d 148, 150.

The cases cited by petitioners show that under Section 37 courts have referred the factual issue to a master (e.g., *Steigleder v. McQuesten*, 198 U.S. 141) or held a special trial, or tried that issue independently of the jury but at the time of the trial of the merits (e.g., *Gilbert v. David*, 235 U.S. 561). In the leading case on use of affidavits in this Court on jurisdictional matters—*Red River Cattle Co. v. Needham*, 137 U.S. 632, (not cited by petitioners)—where the jurisdictional element was the amount in controversy, this Court said that the issue is to be settled on affidavits only "when the value is not really in dispute" and was not covered by the evidence at the trial more or less accidentally. It said that if there is a real controversy requiring careful weighing of conflicting evidence, the issue should not be settled on *ex parte* statements.

Where a preliminary jurisdictional inquiry reveals that there is a question of fact and that it is identical or intermingled with the merits, a plaintiff is entitled to introduce his evidence at a proper trial and may not be relegated to a contest of ex parte affidavits. In such a case, the only "appropriate" procedure is to try the entire case. A district court, by treating a question of merits as a question of jurisdiction, may not dispose of it summarily. Cf. *Huntington v. Laidley*, 176 U.S. 668, 679; *Illinois Central R.R. Co. v. Adams*, 180 U.S. 28 (see p. 118, supra).

Arguing that the burden of supporting federal jurisdiction rests on the plaintiff, petitioners would deny plaintiffs the opportunity to support, at a trial of the case, whatever burden of proof may rest upon them. It is beside the point to cite cases where the very facts alleged in the complaint negative jurisdiction (e.g., *Oregon v. Hitchcock*, 202 U.S. 60; *Transcontinental & Western Air v. Farley*, 71 F. 2d 288; *Myers v. Bethlehem Corp.*, 303 U.S. 41); or cases where, the action having gone through trial to judgment, there was no evidence and no finding to sustain the traversed jurisdictional allegations of the complaint (e.g., *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178), or cases where there was no dispute as to the facts and it was merely held that the facts stated in plaintiff's own affidavit failed as a matter of law to show jurisdiction (*KVOS, Inc. v. Associated Press*, 299 U.S. 269).

3. The affidavits on which petitioners rely were filed only for the purpose of opposing the respondents' motion for interlocutory injunction, and respondents were never apprised in the District Court that they were called on to respond to them in any other connection.

It is beside the point to cite cases holding that a defendant before answer may by motion traverse the allegations of jurisdiction and place plaintiff on proof (e.g., *KVOS, Inc. v. Associated Press*, supra), for petitioners made no motion. It is

also beside the point to say that a court may of its own motion require the jurisdictional facts to be established by evidence before trial of the merits. Whether the power is based on Section 37 of the Judicial Code or on the power to grant a speaking motion to dismiss, where the court of its own motion causes jurisdictional inquiry to be made, it must do so "either by having the proper issue joined and tried, or by some other form of appropriate proceeding" (*Wetmore v. Rymer*, 169 U.S. 115, 122). Unless the plaintiff is apprised that he is called on to give evidence "as to the verity of the jurisdictional fact," an order of dismissal based on factual conclusions contrary to allegations of the complaint will be invalid (cf. *Davis v. Schackleford*, supra, and cases there cited). This is the law under Section 37. On a speaking motion, if matters outside the pleading are presented in support of the motion and not excluded, all parties must be given reasonable opportunity to present all material pertinent to a motion for summary judgment under Rule 56 of the *Rules of Civil Procedure*.[41]

Here plaintiffs were never apprised that they were expected to engage in preliminary trial of the merits to protect jurisdiction.

Petitioners argue that respondents were "apprised." But apprised of what? Apprised, they say (Brief, pp. 28, 29) that "their complaint might be dismissed on jurisdictional grounds." But this is not the matter of which it was necessary that they be apprised. What it was necessary that respondents be apprised of, before the District Court acting on its own motion could dismiss the case for lack of jurisdiction upon a determination of facts contrary to the allegations of the complaint and on the basis of matter outside the complaint, was that the court in-

[41]Cf. proposed amendment to Rule 12(b) in "Report of Proposed Amendments to the Rules of Civil Procedure for the District Courts of the United States" submitted by the Advisory Committee on June 14, 1936.

tended to make such a *factual* inquiry and determination. Respondents were not apprised, at any time, in any way, that the jurisdiction was to be determined other than on the face of the complaint or that the truth of the allegations of the complaint was to be tried. We refer to the discussion at pages 12-16, supra. Particularly, respondents were not apprised that the question was to be tried on *affidavits*, or that petitioners' affidavits, offered in opposition to the motion for an interlocutory injunction, were to be referred to in testing the truth of facts upon which the "jurisdiction" rested.

4. *Wetmore v. Rymer*, supra, shows that even in a case involving jurisdictional amount, where the trial court decides to try the facts involved in the jurisdictional issue itself rather than let it go to the jury, "its action *must* take a form that will enable this Court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before that court." Here it is patent that, even if the District Court did presume to try and decide any question of fact—which is not the case, its action was not cast into the necessary form, for it made no findings of fact, or anything resembling findings.

The Rules of Civil Procedure "contemplate a determination" of all issues of fact after a hearing, "and that the trial court shall make findings of fact and conclusions of law, to the end that the parties to the litigation and the reviewing court may know the exact factual and legal basis for the trial court's decision." *Publicity Building Realty Corporation v. Hannegan*, 139 F.2d 583, 587 (8 Cir.). And this Court may not be asked to decide factual issues until the facts have been found below. *Panama Mail S.S. Co. v. Vargas*, 281 U.S. 670; *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316; *Borden's Co. v. Baldwin*, 293 U.S. 194, 213.

Conclusion

Respondents respectfully submit that their complaint states a claim for relief and that their suit is not an action against the United States or barred by sovereign immunity.

We submit that the judgment of the District Court dismissing the action was erroneous, and that the decision of the Court of Appeals is correct and should be affirmed.

Respectfully submitted,

Dated: January 17, 1947.

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(APPENDIX FOLLOWS)

APPENDIX I.

Statement prepared from the Commission's own Reports to Congress.

This is the statement referred to at page 116 of the foregoing brief. We submit that it establishes the six facts enumerated on page 117, and it may be read in conjunction with the nine principles enumerated on pages 57, 58.

In this recital when we speak of the "debtor" we refer to Dollar of Delaware and when we speak of the "creditor" we refer to the Commission. By "Blue Book" we refer to the report of April 10, 1939, and by "First Report" we refer to the report of February 17, 1938.

The debtor operated with financial success (Blue Book, 14, 15) until the depression of 1929 and the early thirties as the result of which "volume of traffic and freight rates were seriously down" (Blue Book, 17). In 1936 the Pacific Coast maritime strike "interrupted the service of the vessels" and "revenues were thereby cut off" (Blue Book, 22). On top of these reverses, the creditor in this situation declined to pay to the debtor *earned* mail pay (Blue Book, 22). And then, as of June 30, 1937, the mail contracts were cancelled under the *Merchant Marine Act of 1936* (Title 46, *U.S.C.*, Sec. 1141-1143). That Act provided for the settlement and payment by the Commission of all claims for damages arising out of the premature termination of the contracts (First Report, p. 2), and the Commission was under a statutory duty to enter into a settlement agreement for payment to claimants of what it believed to be a fair adjustment and to pay such sum (Title 46 *U.S.C.*, Sec. 1142(b)). As a result of the cancellation, the debtor had a claim against the United States. *The creditor believed that the claim was valid in a substantial amount* (Blue Book, p. 34), but, in order to weaken the debtor's

position and to aid the creditor to obtain control of its management, the creditor refused to settle or adjust the claim or to make any payment. As December 31, 1937 was the last day allowed by the Act for filing suit in the Court of Claims for damages for the cancellation of mail contracts, the debtor was compelled to file a petition in that court seeking recovery of nearly $6,000,000.00 (First Report, p. 28).

The Act also provided for so-called direct operating differential subsidies in lieu of ocean mail contracts. These subsidies were for the sole purpose of placing the operation of vessels of American operators on a parity with those of foreign competitors.

But the creditor refused to grant to the debtor any such subsidy (cf. First Report, p. 2), despite the creditor's avowed belief that "The Company obviously could not maintain its services after June 30, 1937, without a subsidy" (Blue Book, p. 23).

Notwithstanding the cutting off of revenues by the cancellation of the mail contracts, the refusal of the creditor to settle the claims of the debtor for damages arising from the cancellation, and its refusal to grant an operating differential subsidy, the debtor continued to maintain service on its transpacific and round-the-world lines without government aid or assistance in any form until January 25, 1938.

In the midst of its difficulties, disaster struck the debtor again; its steamship "President Hoover" was wrecked off Formosa:

> "This jeopardized the proposed plan of reorganization and made it impossible for the plan to be completed by December 31, 1937, the date of expiration of the Company's agreements with its trade creditors and with the Bank. It was obvious that the *Hoover* loss would have an adverse effect on the possible earnings of the Company, although the fact that it was insured in excess of the mortgage indebtedness would reduce the Company's indebtedness." (Blue Book, p. 33).

But the creditor withheld payment of the insurance proceeds (Blue Book, p. 3) and only released small sums to the debtor from time to time "to enable the company to meet pressing obligations and avoid a complete shut-down of its services" (Blue Book, p. 4).

Meanwhile, too, mail pay for carrying the mail prior to cancellation of the mail contracts was due the debtor, but the creditor refused to pay, and it offset the sums due against the mortgage debt for the avowed purpose of gaining an advantage in the event the debtor went into 77B reorganization (Blue Book, 28). "This action of the Commission [in offsetting the mail pay] had the necessary consequence of making the entire first plan of reorganization impossible of fulfillment * * *" (Blue Book, 28).

Finally the creditor offered a *temporary* six months' operating differential subsidy. But it offered even that limited subsidy only on condition, *inter alia*, (1) *that the debtor release, without any consideration whatever, its claim of nearly $6,000,000.00* for damages arising from cancellation of the ocean mail contracts, (2) that respondent Dollar of California and affiliated companies, who were at that time creditors of the debtor in an aggregate amount exceeding $1,338,900.00, release their creditor claims in exchange for preferred stock, thereby subordinating their position to one of inferiority to the continued creditor position of the Commission, (3) that, while the creditor would extend the maturity date of that portion of the indebtedness which was then due, the debtor and the co-obligors must agree that in the event no further subsidy should be granted by the creditor, on the termination of the temporary six months' subsidy, the creditor could accelerate the due date of the entire debt and declare it due and payable immediately, although a substantial portion of the debt was not yet due or payable and but for such an acceleration would not be due for a matter of years, (4) that the

creditor be permitted to select one member of the Board of Directors and otherwise limit the right of the stockholders to select the directors, and (5) that a half million dollars of new capital be placed in the company by the Dollar interests (First Report, pp. 5-10).

Under compulsion of its necessitous condition, the debtor and its stockholders were compelled to, and did, accept the terms and conditions. The claim of nearly $6,000,000.00 was released, without the receipt of one cent payment, and respondent Dollar of California and the other Dollar companies, by April 1938, accepted preferred stock in lieu of their claims as creditors. To this end the debtor was compelled to enlarge its capital by the creation of preferred stock, a wholly new class of stock. And on January 25, 1938, the temporary subsidy contract was entered into with the creditor. (First Report, pp. 11-31, particularly pp. 22-26, 28, 30).

The stockholders would have been justified in assuming that on compliance with these previous conditions, a long-range subsidy would be arranged. But the consequences of this transaction and the light in which the Commission regarded it are disclosed by it in the Blue Book, thus (at p. 34):

> "It should be noted in this connection that on December 30, 1937 the Dollar Line and its parent company, Dollar of California, filed a petition in the Court of Claims against the United States for almost $6,000,000 based upon the cancellation of mail contracts. While many of the claims were of doubtful validity and while the Commission was believed to have well-grounded counterclaims, nevertheless, *the best judgment of the Legal Division was that the Dollar Lines might obtain some recovery as a result of the statutory termination of the contracts.*
>
> * * * * * *
>
> "On the other hand, if the subsidy agreement could be worked out, *the litigation would be completely disposed of without cost to the Government, and would cease to be an embarrassing factor* if at the end of the six months'

period no final plan of financial readjustment could be worked out, and a judicial reorganization might then become necessary."

Thus in granting the temporary subsidy the Commission was motivated not merely by a legitimate desire *as the United States Maritime Commission* to assist American shipping, as required by law, but also by the desire, *as creditor*, to dispose of litigation without cost to the government and to eliminate a factor that would embarrass it in its creditor demands at the end of six months. And then the creditor gloatingly described the consequences of the fact that the debtor had released, without any consideration whatever, its claim for damages for termination of the mail contracts and of the fact that respondent Dollar of California and the other Dollar companies had relinquished their positions as creditors and had accepted the subordinate position of preferred stockholders:—

"Consequently, their bargaining position was much weaker." (Blue Book, 36).

Thus, having deliberately and avowedly forced the necessitous debtor into a much weaker bargaining position by various means, such as denial of relief admittedly due for cancellation of the mail contracts, the creditor began immediately to press for more and more security, and it did so primarily to obtain voting control and control of the management until the debt was paid.

In the very first paragraph of the Blue Book the creditor summarizes the events transpiring after January 25, 1938 as follows:

"The purpose of this report to Congress is to summarize in like manner the further steps taken by the Commission since January 25, 1938 *which culminated in the acquisition by the Commission of stock control* of Dollar Steamship Lines, Inc., Ltd. (now called American President Lines, Ltd.), the granting of a 5-year operating differential subsidy to that company, and the making of loans for repairs

by the Commission and for working capital and other purposes by the Reconstruction Finance Corporation."

We call attention to the fact that the report here emphasizes acquisition of *stock control*, not the acquisition of ownership, striking confirmation that the dominant purpose of the agreement of August 1938 was to obtain control as a security (see pages 47-49, supra).

The report continues by describing the negotiations after January 25, 1938 thus:

> "In the meantime there had been discussions between members of the Commission's staff and Mr. R. Stanley Dollar, with regard to *certain additional conditions contemplated by the plan, to be met by the Dollar interests, including particularly a pledge of the voting stock.* In view of the requirement of the Reconstruction Finance Corporation that the existing mortgage debt of $7,500,000 held by the Commission be subordinated to the new loan to be made by that agency, *the obtaining of additional security for the subordinated indebtedness was a matter of prime importance.* Accordingly, on April 26, 1938, representatives of the Commission, pursuant to its instructions, advised Mr. R. Stanley Dollar that the Commission was unwilling to grant a 5-year operating differential subsidy agreement, to make advances for repairs, or to subordinate its present mortgage loans to the new funds advanced by it and the Reconstruction Finance Corporation, *unless stock control of Dollar Steamship Lines, Inc., Ltd. was deposited with the Commission or its nominee.*" (Blue Book, pp. 4-5).

The creditor wanted a pledge not only of all B stock owned by respondents and their affiliated interests but also of their A stock (Blue Book, 44). In reply the debtor and allied interests advised the creditor that they were not willing to pledge their stock but would consider a transfer of the voting control.

> "On the following day, April 27, 1938, the Commission having been advised that the Dollar interests *were unwill-*

ing to pledge their stock but were considering at most a transfer of voting control for the purpose of electing directors, decided to advise Mr. Dollar in writing of the minimum terms and conditions upon which the Commission would enter into the long-term subsidy agreement. Such a letter was approved by the Commission on April 28, 1938, and transmitted to Mr. Dollar." (Blue Book, p. 5).

Thus the difference between the debtor and the creditor at this point was merely with respect to the extent of additional security.

The substance of the letter of April 28, 1938, just mentioned, is summarized thus:—

"The conditions of the commitment, speaking generally, called for the *pledge* by the Dollar interests *of all the collateral which the commission considered was available as security for the indebtedness to be subordinated. These conditions also included the securing of firm voting control by the Commission.*" (Blue Book, p. 5).*

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*The series of events described above are summarized elsewhere in the Blue Book as follows (pp. 39-40):

"In the meantime there had been discussions between members of the staff and Mr. Dollar with regard to certain additional conditions contemplated by the plan to be met by the Dollar interests, including particularly the pledging of the voting stock. It was reported to the Commission on April 26 that members of the Long Range Subsidy Committee had discussed with Mr. Dollar the possibility of pledging certain securities held by the Dollar interests as security for the proposed subordination of the mortgages held by the Commission but no commitments had been made.' The minutes of that day set forth:

"It was the sense of the Commission that Mr. Dollar be informed that the Commission was unwilling to grant a 5-year operating differential agreement unless stock control of the Dollar Steamship Line, Inc., Ltd. was deposited with the Commission or its nominee.

"The Commission having been informed on April 27, 1938, that the Dollar interests were unwilling to pledge their stock but were

This letter again shows that the dominant motive of the creditor was to obtain collateral, primarily for the purpose of control. By "all the collateral which it was thought was available," the creditor meant a pledge by the debtor of other property owned by it and a pledge by the controlling stockholders and affiliated interests of all their controlling stock and *also of essentially all other property which they or any of them owned.* And the creditor *also insisted that each and every one of those parties should guarantee the complete and entire indebtedness of the debtor.* Above all other demands, the creditor insisted upon securing firm voting control of the debtor to secure that indebtedness.

By reply of May 26, 1938 the debtor acquiesced in much but not all of the demands made by the creditor in its letter of April 28th:—

> "This reply was considered by the Commission to be unsatisfactory because some of the proposed guarantors refused to make any guaranty, while others hedged their agreements to guarantee in such manner as to make their guaranties worthless." (Blue Book, p. 99).

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considering at most a transfer of voting control, at least for the purposes of electing directors, the Commission directed that a letter be drawn up for submission to Mr. Dollar setting forth in detail the minimum terms and conditions under which the Commission would enter into the permanent subsidy agreement. * * * The April 28 letter committed, subject to compliance with its terms, the Commission to subordinate its existing debts, to lend up to $1,500,000 for repairs, to grant a 5-year subsidy and to rearrange the amortization requirements on the present debt. All this, however, was contingent upon compliance with the conditions of the letter. These conditions, speaking generally, *called for the pledge by the Dollar interests of all the collateral which it was thought was available as security for the indebtedness to be subordinated.* These conditions also had as an objective the securing of *firm voting control* to be exercised if trouble arose."

But the creditor concluded that it could modify some of the details of its demand in favor of the debtor and its stockholders:—

> "However, as to certain details involved in the Commission's letter of April 28th, it was felt by the Commission that the position of the Commission should be somewhat modified. Accordingly, on June 3, 1938, the Commission took under consideration a tentative draft of a resolution which should specify the minimum terms and conditions under which the Commission would carry out the commitments set forth in the letter of April 28, 1938. On the following day the Commission approved the resolution in final form and directed that it be transmitted to the company." (Blue Book, 5, 6).

Also (Blue Book, 99):

> "The Commission therefore considered it advisable to reconsider its requirements and, in the light of such reconsideration, to restate them in a more formal manner. Accordingly, a resolution was adopted on June 4, 1938, which modified the April 28, 1938, letter in substance, as follows:
>
> "(a) The guaranty of Dollar of California was to be limited to the amount of the present guaranties on the Dollar notes of approximately $3,575,000.
>
> "(b) The guaranty of The Robert Dollar Co. was to be limited * * *.
>
> "(c) An additional requirement was inserted for a guaranty by H. M. Lorber secured by his stockholdings in Dollar of Delaware, Dollar of California, and The Robert Dollar Co., but with his liability limited to the collateral.
>
> "(d) The guaranty of Estand, Inc., required by the April 28, 1938, letter was eliminated."

Thus the resolution of June 4th was essentially a reaffirmation of the demand of April 28th somewhat modified in the direction of leniency. *It was still a request for collateral*, the insistence still being an additional collateral and guarantees from

members of the Dollar interests, not only the pledge of the A and B stock of the debtor but of numerous other properties owned by respondents.

On June 17, 1938 the debtor replied to the creditor's demand of June 4th. The reply is not set forth in the Blue Book, but the summary of it appearing there emphasizes the collateral nature of the eventual transaction agreed to less than two months later.

According to the Blue Book, the letter of June 17th proposed two alternatives: First, that the creditor *buy* the ships owned by the debtor and satisfy the debt out of the purchase price; second, that the class B stock be transferred to the creditor in lieu of the personal liability of respondents R. Stanley Dollar and Dollar of California. Thus the Blue Book states (pp. 99-100):—

> "On June 17, 1938, Mr. Dollar replied to the resolution by a telegram followed by a letter which, with enclosures, in effect constituted a refusal to agree to the terms of the resolution and which contained a counterproposition for the purchase of the vessels at a price of approximately $18,000,000."

The alternatively suggested transfer of the B stock was to give the creditor the security of having voting control:—

> "The telegram and letter, however, contained certain tentative suggestions that the Commission acquire the vessels of the Dollar Line or that it acquire the class B common stock, *which stock carried with it the voting control of the company.* Acquisition of the vessels at the figures suggested by the Dollar interests was not considered within the realm of practicability." (Blue Book, p. 6).

Although the Blue Book does not contain but merely purports to summarize, the debtor's reply of June 17, 1938, a purported copy of the reply is attached to Land's affidavit as Exhibit B (R. 31). This letter made no suggestion whatever that any stock be transferred to the creditor but, after stating willing-

ness to acquiesce in some of the creditor's demands of June 4th, suggested that the creditor buy the debtor's vessels at $18,550,000 and pay off the debt in entirety from the proceeds. This letter also forwarded to the creditor copies of letters that had been received by the debtor from several of its stockholders in response to the creditor's demands of June 4th. Respondent R. Stanley Dollar's letter (R. 35) suggested transfer of the ships in payment of the entire indebtedness. Respondent Lorber's letter (R. 35, 36) suggested his willingness "to *pledge* my holdings of 9174 shares of Class A stock," *the exact shares that be in fact transferred under the agreement of August 1938.* Respondent Dollar of California's letter. (R. 37, 38) suggested the transfer to the Commission of its B stockholdings in Dollar of Delaware and its discharge as co-maker on the debtor's notes; there is not a word in this letter to characterize the transfer as being an outright divesting of title or to show that what had been proceeding as negotiations for better security suddenly became transmogrified into an outright transfer of property.

At the time the debtor forwarded these suggestions to the creditor on June 17, 1938 and thereby suggested that the creditor buy the debtor's ships and pay off the indebtedness from the proceeds, the ships were well worth the entire indebtedness:—

> "Furthermore although the vessels have a world market value somewhat in excess of the mortgages on them, their value for the purpose of making part payment by way of 'trade-in' on a new construction program is so restricted by statutory limitations upon the amount which can be allowed as part payment, that they could not be taken in, *generally speaking*, for more than the mortgages." (Blue Book, p. 44; italics are in the original).

Since the ships had been purchased from the United States Shipping Board (First Report, p. 1), they could not be sold to non-American operators without the consent of the creditor

(Title 46 *U.S.C.* Sec. 808, 864). No American operator could operate them in competition with foreigners without an operating differential subsidy, the granting of which was also in the control of the creditor. Thus, although the debtor's assets were admittedly worth more than enough to pay the debt, the creditor was in the unique position of controlling the market for these assets and the price at which the debtor could sell them, and the creditor thus had the debtor at its absolute mercy.

Upon receipt of the communication of June 17th, the creditor considered the choices available to it for the protection of the indebtedness: It could institute a mortgage foreclosure proceeding against the debtor, but this it did not want to do because foreclosure on its present security would impair its chances of collecting the debt, not improve them (Blue Book, pp. 6, 7). The alternative to foreclosure was to grant a long-term subsidy and to subordinate its $7,500,000 indebtedness to new money to be borrowed by Dollar of Delaware from the Reconstruction Finance Corporation. If the creditor should follow this course, two further alternatives presented themselves:—it could subordinate its debt and grant the subsidy either with or without further or better security, i.e., (a) require no financial guarantees and stock control as it had requested by the resolution of June 4, 1938, or (b) negotiate with the Dollar interests to obtain the transfer of substantially all of the common stock. The first of these two it was unwilling to do, and it chose to pursue the second course. The foregoing is stated in the Blue Book at pages 7, 8, and is again stated thus:—

> "The suggestion as to the acquisition of the vessels was not a practicable one and was not considered at the meeting of the Commission on June 21, 1938, in which various alternative causes of action were under consideration. * * * Unless the Commission was ready to consider immediate institution of foreclosure proceedings, there were only two alternatives. The first was to carry out the Houlihan-Wil-

cox' plan with the modification which included subordination of the present mortgage indebtedness. This the Commission declined to do. The Commission then considered the other alternative of negotiating with the Dollar interests for accomplishment of the suggestions advanced in their telegram of June 16 and their letter of June 17. These suggestions included the transfer to the Commission of substantially all of the voting stock of Dollar of Delaware, the acquisition of The Robert Dollar Company assets and other matters." (Blue Book, p. 40).

The Houlihan-Wilcox plan was one recommended by the creditor's own representatives to grant a long term subsidy and subordinate the debt to a new loan to be granted by the Reconstruction Finance Corporation without requiring further security (Blue Book, pp. 3, 7, 8), upon transfer of voting control to nominees satisfactory to the creditor (Blue Book, p. 97). This plan was unacceptable to the creditor because:—

"This proposal would, in effect, charge the Commission with responsibility for the company's operations and management without conferring upon the Commission *the right of control* which inheres in stock membership. Indeed, the proposal as set forth above, affords the Commission less control than was provided in the temporary subsidy agreement, wherein the company agreed that its management, including its board of directors, would 'at all times' during the period of the agreement 'be satisfactory to the Commission.' Such 'satisfactory' management was a condition to the continuance of the subsidy agreement." (Blue Book, pp. 98, 99).

Obviously a right of control inherent in stock membership, sufficient to protect the Commission, would be conferred by receipt of stock as collateral.

"Accordingly the Commission sent on June 21, 1938, a telegram to its special counsel in California, outlining the basis on which such negotiations should be conducted" (Blue Book, 8).

The transaction proposed in that telegram is substantially the transaction expressed in the agreement of August 15th.

That the creditor was still talking about additional collateral is obvious from a comparison or contrast of the two alternatives to which it was referring. The first was to subordinate the indebtedness to new money without requiring additional collateral, and the other was to negotiate for *some* collateral, and the character of the additional collateral is specified as the acquisition of the stock.

That the acquisition of the stock was by way of collateral is also demonstrated by the emphasis placed by the creditor on its acquisition of the control of the management. Describing the effect of the transaction of August 1938 the creditor explains:—

> "As to management, the complete control of the Company, which will be obtained under the adjustment plan, puts the Commission in the position of being able to insist upon whatever type of management it may deem best throughout the period of the subsidy * * * (Blue Book, p. 49).
>
> * * * * * * *
>
> "Under the present adjustment plan which the Commission has already approved, the last grasp of the controlling interests upon the management is to be relinquished. The divorcement of these interests from any control over the affairs of the Company, which was partly effected in January of this year, will, upon consummation of the present plan, be made absolute." (Blue Book, p. 50).

The emphasis here is upon the transaction as one which divorced the Dollars from control over the management of the company, not as one which eliminated them from any ownership of an equity and destroyed the right of redemption.

The dominant motive of the creditor, from the earliest stages of the negotiations to the final agreement, as one to obtain management control, and the unchanged character of the transaction from the beginning to the end, are clearly reflected, too, in the following passage:—

> "From the very early stages of the negotiations which ultimately led to the plan for a long-term financial rehabilitation of Dollar of Delaware, it was recognized that effective voting control of the company must be obtained by the Commission." (Blue Book, p. 60).

The creditor's purpose in requesting, insisting upon, and entering into the transaction evidenced by the contract of August 15, 1938, was to acquire voting control and the control of the management of the debtor until the repayment of the indebtedness. It also desired control of the management during the five year subsidy period, but holding the stock in pledge to secure the debt would give it that control and it so believed at the time. It believed in August 1938 that the indebtedness would not be paid for a period of five years but that it would thereafter be paid. Thus it believed that the period of the contemplated five-year subsidy would be less than the period during which the debt would remain outstanding. (Blue Book, pp. 44, 49). Indeed, five years and one month later, the debt was paid.

For the transfer of the stock the creditor paid no consideration. It reported (Blue Book, p. 62):—

> "There was no monetary consideration given by the Commission for the acquisition of any of the shares or option rights mentioned above; the sole consideration being the release of R. Stanley Dollar and Dollar of California from their liability with respect to mortgage obligations of Dollar of Delaware to the Commission."

This passage may be read in connection with the discussion at pages 55-56, supra.

In view of the fact that the creditor's indebtedness was secured by mortgages on all the ships of the debtor, and that those ships were essentially all the debtor's assets, the capital stock of the debtor represented in substance the equity of redemption of the debtor's owners. An outright transfer of stock

to the creditor would have constituted a transfer and a relinquishment by the debtor to the creditor of the equity of redemption in circumstances of necessity and pressure.

The acquisition of a greater interest in the stock than as security would have constituted the seizure of an unconscionable advantage, as the result of which the creditor would now have obtained complete repayment of the indebtedness due it and yet solely as the result of the one time existence of the indebtedness would now be the owner of over two-thirds of the debtor and its assets and of over 92% of its voting control. We submit that the facts and circumstances are such that equity cannot permit the agreement of August 15, 1938 or the deliveries of stock made under it to be treated as anything but a security transaction.

APPENDIX II.

PUBLIC LAW 404—79TH CONGRESS
CHAPTER 324—2D SESSION
[S. 7]

TITLE

SECTION 1. This Act may be cited as the "Administrative Procedure Act".

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes

any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

* * * * * * *

(f) SANCTION AND RELIEF.— "Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

* * * * * * *

SANCTIONS AND POWERS

SEC. 9. In the exercise of any power or authority—

(a) IN GENERAL.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

* * * * * * *

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone

the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Approved June 11, 1946.

p. 5

SUPREME COURT OF THE UNITED STATES

No. 207.—October Term, 1946.

Emory S. Land (Chairman, United States Maritime Commission), Howard L. Vickery (Vice Chairman, United States Maritime Commission), et al., Petitioners, v. R. Stanley Dollar, Dollar Steamship Line, The J. Harold Dollar Estates Company, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 7, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners are present and former members of the United States Maritime Commission. Respondents are stockholders of Dollar Steamship Lines, Inc., Ltd. (Dollar of Delaware), whose corporate name was changed to American President Lines, Ltd., subsequent to the execution in 1938 of a contract out of which the present litigation arises. By 1937 Dollar of Delaware was in difficult financial straits. The problems confronting it and the various steps taken to remedy the situation need not be recapitulated here.[1] It is sufficient for purposes of the various questions presented by this case to say that the Commission and respondents entered into a contract in 1938 by which respondents delivered their common stock in Dollar of Delaware, endorsed in blank, to the Commission; and the Commission released some of respondents from certain

[1] The details of the difficulties, and the steps taken to remedy them are contained in two reports to Congress by the Commission: (1) Financial Readjustments in Dollar Steamship Lines, Inc., Ltd., dated February 17, 1938; (2) Reorganization of American President Lines, Ltd., dated April 10, 1939.

obligations and agreed to grant Dollar of Delaware an operating subsidy and to make a loan to it and to obtain for it another loan from the Reconstruction Finance Corporation.

The subsidy was granted and the loans were made. By 1943 American President Lines, Ltd., had fully paid all indebtedness due the United States. Respondents thereupon demanded return of their shares of stock from the then members of the Commission, claiming that the shares had only been pledged as collateral for a debt which had been paid. The members of the Commission refused to surrender the shares, claiming that they had not been pledged under the 1938 contract but transferred outright. Acting on that theory the Commission had indeed offered the shares for sale and had under consideration substantial offers to purchase them.

Thereupon respondents instituted the present suit in the District Court for the District of Columbia, see 11 D. C. Code, §§ 301, 305, 306, claiming that petitioners were unlawfully in possession of respondents' stock and illegally withholding it. The prayer was that petitioners be restrained from selling the shares and be directed to return them to respondents. Respondents moved for a preliminary injunction. Petitioners submitted affidavits opposing the motion. After a hearing, the District Court on its own motion dismissed the complaint with prejudice, holding that the suit was against the United States. The Court of Appeals reversed. 154 F. 2d 307. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.[2]

First. The facts asserted in the affidavits support the view that the 1938 contract called for the outright transfer

[2] Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U. S. 373, 377.

of the shares, not for their pledge. But we put the affidavits to one side for two reasons. In the first place, the function of the affidavits was to oppose the motion for a preliminary injunction. The case had not been submitted for decision on the merits. Issue, indeed, had not yet been joined. And the ruling of the District Court, as we read it, was based on the premise that since the Commission had the right to make the contract, the suit was against the United States.[3] Hence we do not think the District Court in fact relied on the affidavits in dismissing the complaint. In the second place, although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings,[4] this is the type of case where the question of jurisdiction is dependent on decision of the merits.

The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States. That conclusion would follow if either of respondents' contentions was established:

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[3] The District Court said: ". . . I think . . . that the Commission had the legal right; and therefore I think it is inescapable that this is a suit against the United States and therefore that the complaint must be dismissed. . . ."

[4] In passing on a motion to dismiss because the complaint fails to state a cause of action, the facts set forth in the complaint are assumed to be true and affidavits and other evidence produced on application for a preliminary injunction may not be considered. *Polk Co.* v. *Glover*, 305 U. S. 5, 9; *Gibbs* v. *Buck*, 307 U. S. 66, 76. But when a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion, Judicial Code § 37, 28 U. S. C. § 80, Fed. R. Civ. P. 12 (h), the court may inquire by affidavits or otherwise, into the facts as they exist. *Wetmore* v. *Rymer*, 169 U. S. 115, 120–121; *McNutt* v. *General Motors Corp.*, 298 U. S. 178, 184 *et seq.*; *Kvos, Inc.* v. *Associated Press*, 299 U. S. 269, 278. As stated in *Gibbs* v. *Buck*, *supra*, pp. 71–72, "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."

(1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares.

If respondents are right in these contentions, their claim rests on their right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort.[5]

If viewed in that posture, the case is very close to *United States* v. *Lee*, 106 U. S. 196. That was an action in ejectment to recover possession of a tract of land. The defendants were military officers who, acting under orders of the President, took possession of the land and converted one part into a fort and another into a cemetery. For the lawfulness of their possession they relied on a tax sale of the property to the United States. On the trial it was held that the claim of the plaintiffs to the land was valid and that the defendants were wrongfully in possession. The Court affirmed the judgment over the objection that the suit was one against the United States. It held that the assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action; that a determination of whether their "authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question." P. 219. It further held that while such an adjudication is not *res judicata* against the United States because it cannot be made a party to the suit, the courts have jurisdiction to resolve the controversy between those who claim possession. And it concluded that an agent or officer of the United States who acts beyond his authority is answerable for his actions. And see *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620; *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549, 567.

[5] Restatement of the Law of Torts, §§ 223, 237; 3 Street, Foundations of Legal Liability (1906), p. 160.

Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States* v. *Lee*, *supra*, has been repeatedly approved. *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446, 452; *Tindal* v. *Wesley*, 167 U. S. 204; *Smith* v. *Reeves*, 178 U. S. 436, 439; *Scranton* v. *Wheeler*, 179 U. S. 141, 152–153; *Philadelphia Co.* v. *Stimson*, *supra*, pp. 619–620; *Goltra* v. *Weeks*, 271 U. S. 536, 545; *Ickes* v. *Fox*, 300 U. S. 82, 96; *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 50–51. That rule is applicable here although we assume that record title to the shares is in the Commission. In *United States* v. *Lee*, *supra*, record title of the land was in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. Though the judgment was not *res judicata* against the United States, p. 222, it settled as between the parties the controversy over possession. Precisely the same will be true here, if we assume the allegations of the petition are proved. For if we view the case in its posture before the District Court, petitioners, being members of the Commission, were in position to restore possession of the shares which they unlawfully held.

We do not trace the principle of *United States* v. *Lee*, *supra*, in its various ramifications. Cases on which petitioners rely are distinguishable. This is not an indirect attempt to collect a debt from the United States by preventing action of government officials which would alter or terminate the contractual obligation of the United States to pay money. See *Wells* v. *Roper*, 246 U. S. 335; *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371. It is not an attempt to get specific performance of a contract to deliver property of the United States. *Goldberg* v. *Davis*, 231 U. S. 218. It is not a case where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin

disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress. *Cunningham* v. *Macon & Brunswick R. Co., supra*; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Nagayab* v. *Hitchcock*, 202 U. S. 473; *Louisiana* v. *Garfield*, 211 U. S. 70; *Morrison* v. *Work*, 266 U. S. 481. And see *Stanley* v. *Schwalby*, 162 U. S. 255, 271–272.

We say the foregoing cases are distinguishable from the present one, though as a matter of logic it is not easy to reconcile all of them. But the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The "essential nature and effect of the proceeding" may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration. *Ex parte New York*, 256 U. S. 490, 500, 502. If so, the suit is one against the sovereign. *Mine Safety Co.* v. *Forrestal, supra*, p. 374. But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.

It is in the latter category that the pleadings have cast this case. That is to say, if the allegations of the petition are true, the shares of stock never were property of the United States and are being wrongfully withheld by petitioners who acted in excess of their authority as public officers. If ownership of the shares is in the United States, suit to recover them would of course be a suit against the United States. But if it is decided on the merits either that the contract was illegal or that respondents are

pledgors, they are entitled to possession of the shares as against petitioners, though, as we have said, the judgment would not be *res judicata* as against the United States. See *United States* v. *Lee*, *supra*, p. 222.

We intimate no opinion on the merits of the controversy. We only hold that the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits.

Second. Motions were made by the Solicitor General to substitute as defendants the new members of the Commission for those who are no longer members.* We added the new members as petitioners-defendants, and dismissed as to a deceased member, but reserved decision as to the other former members. 329 U. S. —. A majority of those joining in this opinion are of the view that it is more appropriate that both motions be considered by the District Court. The questions have not been briefed or argued here. Moreover, the present record may not present all the facts necessary for disposition of the motions. Accordingly, we vacate the order of substitution which we entered, so that the District Court may, on remand of the cause, pass on the motions unembarrassed by any action here.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACK took no part in the consideration or decision of this case.

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* See Fed. R. Civ. P. 25 (d); *Allen* v. *Regents*, 304 U. S. 439, 444–445.

SUPREME COURT OF THE UNITED STATES

No. 207.—October Term, 1946.

Emory S. Land (Chairman, United States Maritime Commission), Howard L. Vickery (Vice Chairman, United States Maritime Commission), et al., Petitioners, v. R. Stanley Dollar, Dollar Steamship Line, The J. Harold Dollar Estates Company, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 7, 1947.]

Mr. Justice Reed, concurring.

As I think this proceeding states a cause of action against the United States Maritime Commission, I do not agree with the manner of disposition. No damages are sought against the petitioners. Relief is sought that can only be obtained by an order directed against the Commission.

A contract between plaintiffs, Dollar et al., and the United States Maritime Commission, was attached to the complaint as an exhibit. The contract was not signed by any individual member of the Commission but by the Commission through its duly authorized special counsel. In the complaint, respondents alleged that they and their predecessors in interest "caused said shares of stock of the company to be transferred to the United States Maritime Commission." They further alleged that they made demand upon the "Maritime Commission for the return of said stock in July, 1945. This request was denied by the Maritime Commission in July, 1945." The ultimate result sought by the complaint was that the respondents "be directed and ordered by this court to return the plain-

tiffs' stock, now in the unlawful possession and custody of the defendants, to the plaintiffs, the lawful owners." Taken as a whole, I cannot read the complaint otherwise than as alleging that title and possession of this stock is now in the United States Maritime Commission. Although plaintiffs assert possession in the defendants, the other allegations and the attached contract show that defendants hold the stock by virtue of their official positions as members of the Commission. If the basic allegations were proven, the Commission would be shown to be in possession of the stock under a claim of right.

If that is the correct interpretation of the complaint, it follows of course that the Maritime Commission is an indispensable party to this proceeding. See *Commonwealth Trust Co.* v. *Smith*, 266 U. S. 152, 159. No matter how far beyond their statutory powers the members of the Commission may have acted in contracting with the respondents or how illegal may be the retention of the certificate by the Commission under its claim of ownership through the contract, the transfer to the Commission, as alleged in the petition, put the title and possession of this property in the Maritime Commission and not in the petitioners as individuals. It may be that the Commission holds the stock wrongfully but if so, it can only be restored to the respondents by an act of the Commission. Under such circumstances, cases like *United States* v. *Lee*, 106 U. S. 196, are inapplicable. In the *Lee* case, an action in ejectment was brought to recover possession of land from officers of the United States who were wrongfully in possession of the land. That suit was not brought against the United States to compel the United States to retransfer title to the complainants or to quiet title in those who claimed against the United States. In *United States* v. *Lee*, the officer of the United States could be ejected from the real property involved without loss of title or right of possession to the United States. That is not the result

in this case. A piece of paper, the stock certificate, will be taken from the hands of the Maritime Commission and placed in the hands of plaintiffs by a court decree, if plaintiffs are successful. If the decree is to be effective, it will require the individual defendants to transfer the certificates by endorsement of the name of the Maritime Commission or delivery, if the certificate is still in the name of the plaintiffs. The situation is as if the United States had been ordered by the decree in the *Lee* case to convey title to and possession of the property to Lee. Plaintiffs do not here seek damages for past acts of petitioners. Plaintiffs want property now in the possession of the Maritime Commission and to secure this relief, plaintiffs, I should think, must implead the Commission. Whether the Maritime Commission holds the property by title unchallenged by the plaintiffs or challenged by the plaintiffs cannot, it seems to me, be determinative as to the necessity of making the Commission a party. See *Goldberg* v. *Daniels*, 231 U. S. 218.

Cases cited in the opinion of the Court as following the rule of *United States* v. *Lee* are not significant here. Two are similar cases of ejectment.[1] Other cases cited turn on liability of a soverign to suits.[2] Still others are those which enjoin an officer from proceeding illegally.[3] In *Goltra* v. *Weeks*, 271 U. S. 536, 539, 549, there was a suit by a lessee to enjoin officers of the United States from taking possession of boats leased to the plaintiff by the Government and also to return the boats already taken. The prayer for a return of the property contained the possi-

[1] *Tindal* v. *Wesley*, 167 U. S. 204; *Scranton* v. *Wheeler*, 179 U. S. 141.

[2] *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446; *Smith* v. *Reeves*, 178 U. S. 436; *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47.

[3] *Ickes* v. *Fox*, 300 U. S. 82; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

bility of the issue here raised but this Court treated the proceeding as one to enjoin a threatened trespass.

The present suit is for the return to the plaintiffs of property held by the Maritime Commission under a contract which the Dollar interests allege called for a return of the certificates to them on payment of a debt. Such a suit, it seems to me, is an effort to get possession of property actually in the possession of the Maritime Commission. This cannot be done without joining the Maritime Commission as a party defendant. See *Goldberg* v. *Daniels*, 231 U. S. 218; *Wells* v. *Roper*, 246 U. S. 335; *Morrison* v. *Work*, 266 U. S. 481, 487; *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371.

As this appears to me as a suit against the Commission, I would affirm the judgment of the Court of Appeals, remanding this case to the District Court. There the questions of the suability of the Commission [4] and the effect of the Administrative Procedure Act of June 11, 1946, could be considered. There the merits of the controversy could be decided.

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[4] Merchant Marine Act, 49 Stat. 1988, § 207, as amended, 52 Stat. 954, § 2:

"The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381.